

MILITARY LAW REVIEW



ARTICLES

ARRESTING "TAILHOOK":
 THE PROSECUTION OF
 SEXUAL HARASSMENT IN
 THE MILITARY. *Lieutenant Commander
 J. Richard Chema*

MILITARY RULE OF EVIDENCE
707: A BRIGHT-LINE
 RULE THAT NEEDS TO
 BE DIMMED.. *Major John J. Canham, Jr.*

CIVILIAN DEMONSTRATIONS
 NEAR THE MILITARY
 INSTALLATION: RESTRAINTS
 ON MILITARY SURVEILLANCE
 AND OTHER ACTIVITIES.. *Major Paul M. Peterson*

TIME TO EXORCISE ANOTHER
 GHOST FROM THE VIETNAM
 WAR: RESTRUCTURING THE
 IN-SERVICE CONSCIENTIOUS
 OBJECTOR PROGRAM *Major William D. Palmer*

MILITARY LAW REVIEW—VOLUME 140

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experiences and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to writings that have lasting value as reference materials for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

EDITORIAL STAFF

MAJOR DANIEL P. SHAVER, *Editor*
MS. EVA F. SKINNER, *Editorial Assistant*

SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Editor of the *Review*.

Inquiries concerning subscriptions for active Army legal offices, other federal agencies, and JAGC officers in the ARNGUS not on active duty should be addressed to the Editor of the *Review*. The editorial staff uses address tapes furnished by the U.S. Army Reserve Personnel Center to send the *Review* to JAGC officers in the USAR; Reserve judge advocates promptly should inform the Reserve Personnel Center of address changes. Judge advocates of other military departments should request distribution from their service's publication channels.

CITATION: This issue of the *Review* may be cited as 140 MIL. L. REV. (number of page) (1993). Each quarterly issue is a complete, separately numbered volume.

POSTAL INFORMATION: The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Second-class postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaced the volume indices in volumes 82 through 90. Volume indices appear in volumes 92 through 95, and were replaced by a cumulative index in volume 96. A cumulative index for volumes 97-101 appears in volume 101, and a cumulative index for volumes 102-111 appears in volume 111. Volume 121 contains a cumulative index for volumes 112-121. Volume 131 contains a cumulative index for volumes 122-131.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to U.S. Government Periodicals*; *Legal Resources Index*; three computerized data bases, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*; and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current U.S. Government Periodicals on Microfiche*, by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

MILITARY LAW REVIEW

Volume 140

Spring 1993

CONTENTS

ARTICLES

- Arresting “Tailhook:
The Prosecution of
Sexual Harassment in
the Military *Lieutenant Commander
J. Richard Chema* 1
- Military Rule of Evidence
707: A Bright-Line
Rule that Needs to
Be Dimmed.....*Major John J. Canham, Jr.* 65
- Civilian Demonstrations
Near the Military
Installation: Restraints
on Military Surveillance
and Other Activities*Major Paul M. Peterson* 113
- Time to Exorcise Another
Ghost From the Vietnam
War: Restructuring the
In-Service Conscientious
Objector Program*Major William D. Palmer* 179

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted, typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (hereinafter TJAGSA). Authors also should submit 5¼-inch or 3½-inch computer diskettes containing their articles in IBM-compatible format.

Footnotes also must be typed double-spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from the beginning to end of a writing, not chapter by chapter. Citations should conform to *A Uniform System of Citation* (15th ed. 1991), copyrighted by the *Columbia, Harvard, and University of Pennsylvania Law Reviews* and the *Yale Law Journal*. *Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.*

Typescripts should include biographical data concerning the author or authors. This data should consist of grade or other title, present and immediate past positions or duty assignments, all degrees, with names of granting schools and years received, bar admissions, and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

EDITORIAL REVIEW: The Editorial Board of the *Military Law Review* consists of the Deputy Commandant of The Judge Advocate General's School; the Director, Developments, Doctrine, and Literature Department; and the Editor of the *Review*. They are assisted by instructors from the teaching divisions of the School's Academic Department. The Board submits its recommendations to the Commandant, TJAGSA, who has final approval authority for writings published in the *Review*. The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.

The Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. There is no minimum or maximum length requirement.

When a writing is accepted for publication, a copy of the edited manuscript generally will be provided to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, page proofs are not provided to authors.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies are usually available in limited quantities. They may be requested from the Editor of the *Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Editor of the *Review*.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

MILITARY LAW REVIEW

Volume 140

Spring 1993

ARRESTING “TAILHOOK”: THE PROSECUTION OF SEXUAL HARASSMENT IN THE MILITARY

LIEUTENANT COMMANDER J. RICHARD CHEMA*

I. Introduction

Over the past several years, the military has been rocked by allegations not only that pervasive sexual misconduct against women exists in the ranks, but also that the leadership condones or ignores various sexual abuses. Consider the following reported incidents: “Tailhook;”¹ rapes of female soldiers during Desert Shield and Desert Storm; institutionalized bias against female sexual assault victims so pervasive that Air Force investigators use a “rape allegation checklist” as a way to minimize or discredit female service members’ rape complaints; chaining of a female midshipman to a urinal at the Naval Academy. These and other alarming incidents have focused attention on the way women are treated in the military like never before. The revelation of dishonorable conduct engaged in by many naval officers against women at the Tailhook Convention in September 1991, the apparent

*Judge Advocate General’s Corps, United States Navy. Presently assigned as Command Judge Advocate, Office of Naval Intelligence, Washington, D.C. B.A., 1978, Georgetown University; J.D., 1981, the Ohio State University College of Law; LL.M., 1993, The Judge Advocate General’s School, United States Army. Former assignments include Appellate Counsel, Office of the Judge Advocate General, Appellate Government Division, 1989-1992; Senior Trial Counsel, U.S. Naval Legal Service Office, Naples, Italy, 1988-1989; Staff Judge Advocate, Naval Air Station, North Island, 1985-1986. This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 41st Judge Advocate Officer Graduate Course.

¹In naval aviation, a “tailhook” is the grappling device used to help stop a fixed-wing aircraft landing on an aircraft carrier. The term was adopted by the Tailhook Association as the name for its professional organization dedicated to promoting naval aviation. Because of the highly publicized scandal involving sexual abuse by males against females growing out of the Tailhook Association’s convention, which occurred in Las Vegas in September 1991, the term is now a shorthand description for the events involving that scandal. Throughout this article it will be used in that context.

desire of Navy leadership to cover up the situation, and the failure of the Navy to resolve the scandal in a timely manner have created a public perception of widespread "sexual harassment"² in the armed forces, especially in the Navy. Public awareness of these problems in the military has been heightened because they have followed immediately in the wake of the widely publicized confirmation hearings for Supreme Court Justice Clarence Thomas.³

Apparently in response to the problems perceived to exist in dealing with women, the Navy recently revised its policy on "sexual harassment." On January 6, 1993, the Acting Secretary of the Navy published a regulation implementing a new sexual harassment policy for the naval services. This regulation⁴ defines sexual harassment and makes violation of its prohibition of sexual harassment a punitive offense punishable under the Uniform Code of Military Justice (UCMJ).⁵ This regulation is the first instance of criminalizing conduct as per se sexual harassment, as opposed to prosecuting the underlying conduct under various traditional criminal statutes.

This article examines whether substantive changes in military law—like the Navy regulation—are necessary to deal adequately with the mistreatment of women in the military. It examines conduct that commonly is referred to as sexual harassment and discusses how it can be prosecuted under current provisions of the UCMJ. Additionally, the Navy regulation and other similar regulatory and statutory proposals,⁶ which aim

²The term "sexual harassment" commonly is used to designate a wide range of mistreatment of women. Nevertheless, the term has both a technical legal definition developed through employment discrimination law, and a more expansive lay person's usage, which includes criminal assaultive conduct.

³During the course of those hearings, Anita Hill alleged that she was sexually harassed in the work place by Justice Thomas.

⁴DEPT OF NAVY, SECRETARY OF THE NAVY INSTR. 5300.26B, POLICY ON SEXUAL HARASSMENT (6 Jan. 1993) [hereinafter SECNAV INSTR. 5300.26B].

⁵The punitive reach of the regulation extends to all active and reserve Navy and Marine personnel, as well as midshipmen at the United States Naval Academy or in the Reserve Officer Training Corps. See generally UCMJ art. 2 (1988).

⁶In June 1992, the Secretary of the Navy requested that a separate statute prohibiting sexual harassment be drafted as a proposed amendment to the UCMJ. Memorandum from H. Lawrence Garrett III, Secretary of the Navy to the Judge Advocate General of the Navy (June 12, 1992) (on file with author). In response, a proposed change to the law was drafted. To date, it has not been submitted to Congress. With the continued negative publicity over sexual harassment in the Navy, and the apparent linkage of this issue to the highly controversial issue of homosexuals in the military, such a change to the UCMJ may be submitted.

DEPT OF AIR FORCE, AIR FORCE REG. 30-2, SOCIAL ACTIONS PROGRAM (18 Apr. 1986) (C2, 25 Sept. 1992) [hereinafter AFR 30-2], also purports to be a punitive regulation. This regulation contains, *inter alia*, Air Force policies

directly at criminalizing conduct as sexual harassment, are examined and compared with existing **UCMJ** provisions as vehicles for prosecuting conduct deemed to be sexual harassment.

Criminal prosecution of sex crimes and sexual harassment is an important aspect of an overall military policy against discrimination and abuse of women in the armed forces. Choosing the correct approach, either the direct criminalization of sexual harassment through efforts like the Navy regulation, or an aggressive reliance on traditional criminal statutes geared at the underlying criminal conduct of the alleged harasser, will be a major step towards resolving the mistreatment of women in the military.

11. What Is "Sexual Harassment?"

A. Employment Discrimination Law

Title VII of the Civil Rights Act of 1964 makes it "an unlawful *employment* practice for any *employer* ... to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of *employment*, because of such individual's race, color, religion, sex, or national origin."⁷

This statute has led to the development of a vast body of employment discrimination law. One aspect of employment discrimination is sexual harassment. In 1980, the Equal Employment Opportunity Commission (EEOC) published guidelines defining sexual harassment. The guidelines currently include the following:

Unwelcome sexual advances, requests for sexual favors,
and other verbal or physical conduct of a sexual nature

prohibiting arbitrary discrimination based on age, color, national origin, race, ethnic group, religion, or sex. *Id.* para. 6-3. Included as types of arbitrary discrimination are use of disparaging terms, personal discrimination, and institutional discrimination against any of the above enumerated protected groups. In a change to this regulation on September 25, 1992, sexual harassment specifically is included as a type of prohibited sex discrimination. *Id.* para. 6-4b; *see* *United States v. Kroop*, 34 M.J. 628, 635 n.2 (A.F.C.M.R. 1992) (implying that sexual harassment can be prosecuted as a violation of this order). At this time, few if any prosecutions have occurred because no reported cases deal with the regulation on sexual harassment or other incidents of sex discrimination. The order was used in *United States v. Way*, No. S28590 (A.F.C.M.R. 20 Mar. 1992), to prosecute racial prejudice stemming from saying racial slurs. Although the opinion had little legal analysis, it did hold that the conviction could not be sustained because the regulation was, *inter alia*, "vague." *Id.* slip op. at 5. Both the Navy and Air Force regulations contain essentially the same sexual harassment prohibitions, in that their definitions of sexual harassment are identical and both derive from employment discrimination law.

⁷42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added).

constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁸

The guidelines identify the nature of the two general types of sexual harassment—quid pro quo harassment and hostile environment harassment. Quid pro quo is the most easily recognizable form of sexual harassment. It involves conditioning a subordinate's economic or other job benefits on the subordinate's willingness to furnish sexual favors to a superior. If the victim fails to acquiesce to the superior's sexual demands, quid pro quo harassers may retaliate with some form of work place punishment.⁹

The second type of sexual harassment—hostile environment sexual harassment—is more subtle and pernicious. In this type of sexual harassment, the emotional or psychological well-being of the victim is damaged from having to work in an environment that is polluted with discrimination. Hostile environment sexual harassment falls within Title VII because Congress intended to eliminate employment discrimination in the broadest possible manner through enactment of the statute.¹⁰ The Supreme Court validated the Title VII cause of action for this theory of sexual harassment in *Meritor Savings Bank v. Vinson*.¹¹ Relying principally on the EEOC guidelines then in effect,¹² the Court rejected the contention that an economic or tangible loss was required under Title VII. Instead, Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."¹³ Henceforth, a man or woman no longer would be forced to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living. ..." ¹⁴

⁸29 C.F.R. § 1604.11(a) (1992).

⁹See, e.g., *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59, 62 (2d Cir. 1992); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990).

¹⁰*Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir.), cert. denied, 406 U.S. 957 (1972).

"477 U.S. 57 (1986).

¹²Even though the EEOC guidelines do not have the force of law, the Court used the proposition from *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), that an interpretation of a statute by an enforcing agency is worthy of great judicial consideration. *Vinson*, 477 U.S. at 65.

¹³*Vinson*, 477 U.S. at 65.

¹⁴*Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

Vinson identified three critical issues that have formed the basis for most hostile environment sexual harassment litigation. First, not all conduct rises to the level of actionable harassment that affects terms, conditions, or privileges of employment. Instead, a Title VII violation occurs only if it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."¹⁵

Next, the conduct of the harasser must be "unwelcome," as distinguished from the criminal concept of involuntariness, which involves forced participation against one's will.¹⁶ Since *Vinson*, the test for "unwelcomeness" generally has been whether the harassed employee solicited or incited the conduct, and whether the harassed employee regarded the conduct as undesirable or offensive.¹⁷

Finally, *Vinson* laid out the initial framework for determining when an employer would be liable for the sexual harassment of its employees. It held that agency principles provided some guidance for employer liability, rejecting both strict liability of employers for the sexual harassment of its employees, and absolute immunity if the employer did not have notice of the harassment. It also rejected a contention that the mere existence of a policy against discrimination, coupled with a failure by the plaintiff to use a grievance procedure, insulates an employer from liability. In so doing, the Court recognized that coming forward to complain puts the employee in risk of retaliation.¹⁸

In hostile environment cases, the plaintiff generally must show that the employer knew or should have known of the harassment, and that he or she failed to take proper remedial action to stop the harassment.¹⁹ The employer generally will be held to a higher standard when the harasser is a supervisor, as opposed to when the harasser is merely a coworker.²⁰

Although *Vinson* recognized the hostile environment Title VII cause of action, determining the exact nature of such sexual harassment continues to be difficult. In *Harris v. Forklift*

¹⁵*Id.* (quoting *Henson*, 682 F.2d at 904).

¹⁶*Id.* at 68.

¹⁷*See, e.g.*, *Burns v. McGregor Elect. Indust., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992); *Hall v. Ticknor*, 842 F.2d 1010, 1014 (8th Cir. 1988).

¹⁸*Vinson*, 477 U.S. at 72-73.

¹⁹*Guess v. Bethlehem Steel*, 913 F.2d 463, 464 (7th Cir. 1990); *Burns*, 955 F.2d at 564.

²⁰*Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991).

Systems, *Inc.*,²¹ an owner of a company made sexist remarks and jokes with sexual overtones to a female employee, who tolerated the conduct without complaint for a long period of time. Eventually, she complained to him, and finally quit her job when he continued the conduct, albeit after a brief cessation. The district court dismissed the Title VII action because the female employee was unable to meet the Vinson "severe and pervasive" requirement. The lower courts have ruled that in the absence of a plaintiffs making a showing of serious psychological injury, he or she cannot recover for such offensive comments. On March 1, 1993, the Supreme Court granted certiorari and hopefully will clarify the standard for hostile environment claims. The nature and extent of the ambiguous hostile environment type of sexual harassment for Title VII will be analyzed in this important case.

B. "Sexual Harassment" in the Military

With the passage of the Equal Employment Opportunity Act of 1972,²² federal employees, including those in the Department of Defense (DOD) and the military departments, came within the scope of Title VII. The law's protection, however, as well as its civil remedy are available only to civilian employees because uniformed military members are beyond the scope of the statute. Even though 42 U.S.C. § 2000e-16(a) states that employment discrimination is outlawed as to employees of the military departments, case law has held that uniformed service members are excluded from the protection of these antidiscrimination laws in the absence of explicit congressional inclusion.²³

The refusal to extend the remedy for uniformed personnel is based on the premise that disruption to unique military missions would result if service members were permitted to sue for actions involving their military duties. This is the same rationale delineated in *Chappel v. Wallace*,²⁴ and *Feres u. United States*,²⁵ prohibiting military members from asserting causes of action for constitutional and common-law torts against the military. Accordingly, the military might be liable under Title VII if a uniformed

²¹No. 3-89-0557, 1991 U.S. Dist. Lexis 20940 (M.D. Tenn. Feb. 4, 1991) (adopting Magistrate's Report & Recommendation, 1990 U.S. Dist. LEXIS 20115 (Nov. 28, 1990)), *aff'd*, 976 F.2d 733 (6th Cir. 1992) (decision without published opinion), *cert. granted*, No. 92-1168, 1993 U.S. LEXIS 1937 (Mar. 1, 1993).

²²Pub. L. No. 92-261, 86 Stat. 111 (codified as amended at 42 U.S.C. § 2000e-16).

²³*See, e.g.,* *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Roper v. Department of the Army*, 832 F.2d 247 (2d Cir. 1987). *Contra* *Hill v. Berkman*, 635 F. Supp. 1228 (E.D. N.Y. 1986) (stating minority view that Title VII is available for uniformed personnel to assert sexual harassment claims).

²⁴462 U.S. 296 (1983).

²⁵340 U.S. 135 (1950).

member committed an act of sexual harassment against a civilian employee, but a service member cannot sue the military based on a similar sexual harassment claim. While administrative policies provide some protection to uniformed sexual harassment victims, these victims ordinarily have no direct remedy for violations. This lack of a direct remedy is likely part of the reason for the increased emphasis on criminalization of sexual harassment in the military. Because something must be done, the obvious place to look for a solution, at least in part, is the military justice system.

The military began to implement policies against sexual harassment at about the same time that the EEOC issued its guidelines in 1980. Since then, DOD and each of the military departments have developed policies and issued numerous regulations prohibiting sexual harassment.²⁶ In so doing, these regulations generally have adopted the EEOC and civilian employment definitions of sexual harassment. The current military sexual harassment definition contained in the Secretary of Defense (SECDEF) Memorandum of 20 July 88—which has been incorporated into each of the service's regulations—is as follows:

Sexual harassment is a form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or

(2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

(3) such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual

²⁶Currently, Memorandum from Frank Carlucci, Secretary of Defense to multiple addressees within DOD (July 20, 1988) (on file with author) [hereinafter SECDEF Memo of 20 July 881, and DEP'T OF DEFENSE, DIRECTIVE 1350.2, DOD MILITARY EQUAL OPPORTUNITY PROGRAM (23 Dec. 1988) formulate overall policy opposing sexual harassment for uniformed personnel. See also DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 6-4, (30 Mar. 1988) (C2, 1 Apr. 1992); DEP'T OF AIR FORCE, AIR FORCE REG. 30-2, para. 6-4; SECNAV INSTR. 5300.26B, *supra* note 4.

behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

Comparing this definition to the EEOC guidelines clarifies that the military definition is simply a reformulation of the employment sexual harassment standard in a military context. Note that the military definition of hostile environment sexual harassment deletes the requirement that it be in the context of a "working" environment, apparently in recognition that military personnel are always on duty in settings that traditionally are far more expansive than the civilian work place. Accordingly, the sexual harassment concept in the military is potentially of far greater scope than that of the civilian work force.

While the military regulations greatly expand the reach of sexual harassment, until recently they have been interpreted as being nonpunitive in nature.²⁷ With the enactment of the Navy regulation and the political pressure arising in the wake of the Navy Tailhook scandal, however, increased pressure to prosecute aggravated sexual harassment incidents is predictable. The Navy regulation obviously was enacted with that purpose in mind. Additionally, interest likely will be renewed in using Air Force Regulation 30-2 for that purpose, and the Army probably will encounter pressure to enact a similar punitive regulation. Section IV of this article will analyze in detail the legal consequences of the Navy regulation. The reader should note, however, that the apparent need for greater sanctions against sexual harassment in the military—because of the lack of a Title VII remedy and the highly publicized cases of crimes against women—has led to efforts to criminalize sexual harassment. In doing so, the vehicle used in developing the criminal prohibition against sexual harassment is the definition developed in employment discrimination law. This civil law concept has been adopted in *toto* without any overt modification or adaption for its new criminal setting. Unlike other civil causes of action that are also crimes—such as assault—sexual harassment is very much an evolving, controversial, and unsettled area of the law. The ambiguities of employment discrimination sexual harassment have been magnified in the indiscriminate adaptation of the concept into military criminal law.

²⁷ See *supra* notes 4-6 and accompanying text.

111. The Nature and Extent of the Sexual Harassment Problem in the Armed Forces

A. A New Force Composition With Women: The Historical Background

Prior to World War II, women had only a minor role in the military service. During World War II, however, over 350,000 women served in all branches of the armed forces,²⁸ but they served either in the Nurse Corps or in separate women's units with a command structure distinct from that of the regular forces.²⁹

Female participation in the armed forces steadily decreased after World War II. In 1947 and 1948, Congress passed legislation limiting the enlisted female participation to two percent of force strength, and female officer strength to ten percent of the female enlisted number (not including nurses). The statutory limitation was removed in 1967, but even by 1971 the number of women in the military (approximately 42,800) remained less than two percent.³⁰

In response to the Vietnam War draft experience, the military changed to an all volunteer force beginning in 1973. Additionally, starting in the 1976 academic year, the service academies were opened to women.³¹ Since then, a dramatic rise in the number of women in the armed forces has occurred. By 1980, 8.43% of the force was female, and over the next decade, the force composition of active duty women increased to 11.5% as of 30 September 1992 (205,571 women in a force of 1,794,459).³² Currently, 14.7% of the Air Force, 12% of the Army, 10.4% of the Navy, and 4.5% of the Marine Corps active force is female.³³

In addition to the spiraling numbers of women serving in the armed forces in general, women increasingly have been assuming positions that traditionally were reserved for males. Although certain legal restrictions still limit the combat positions that

²⁸Diana W. Smith & Debra L. Mowery, *Women in Combat: What Next?* 5 (Nov. 15, 1992) (unpublished manuscript, on file with the Naval War College, Newport, R.I.).

²⁹Brady W. Segal & David R. Segal, *Social Change and the Participation of Women in the American Military*, in 5 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS, AND CHANGE 244, 247 (Louis Kriesberg, ed. 1983).

³⁰*Id.*

³¹Department of Defense Appropriation Authorization Act, 1976, Pub. L. No. 94-106, § 803, 89 Stat. 537 (1975).

³²Memorandum, Office of the Assistant Secretary of Defense (Force Management and Personnel), subject: "Women in the Military" (Jan. 27, 1993) (on file with author).

³³*Id.*

women can occupy,³⁴ those restrictions have come under growing attack, and many already have given way to female participation. In November 1992, The Presidential Commission on the Assignment of Women in the Armed Forces issued a highly controversial report to then-President Bush. Generally, the Commission recommended that eligibility for specific positions in the military be determined on a gender neutral basis. In a narrow eight-to-seven vote, however, the Commission recommended continuation of the regulatory land and air combat exclusions for women, while at the same time recommending that most Navy combat vessels be opened to service by women.³⁵ The ultimate responsibility for formulating policy on the extent of female participation in the military was left to the administration of President Clinton. For the purpose of this article, women presumably will continue to have an expanded presence in the armed forces. For example, Acting Secretary of the Navy Sean O'Keefe, in January 1993, recommended that women be required to register for potential conscription on the exact same basis as men.³⁶ That the Commission was convened, and that ideas like Acting Secretary O'Keefe's are being discussed at the highest levels of our government, reinforce the idea that the sexual composition of the force has changed irreversibly. Such changes inevitably have resulted in problems with sexual harassment that require attention.

B. The "New" Sexual Harassment Problem in the Military

This historical background has led to a general presumption that sexual harassment is one form of a negative response by men to the rise of women in the work place and the movement of

³⁴The only statutory combat restriction still in effect is 10 U.S.C.A. § 6015 (1993), which prohibits women from serving on combat vessels. Regulations in each of the services, however, prohibit women from serving in various combat billets. See DEP'T OF ARMY, REG. 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS (27 Mar. 1992); DEP'T OF AIR FORCE, AIR FORCE REG. 35-60, COMBAT EXCLUSIONS FOR WOMEN (18 Aug. 1989); DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 1300.12A, ASSIGNMENT OF WOMEN MEMBERS IN THE DEPARTMENT OF THE NAVY (20 Feb. 1989); HEADQUARTERS, MARINE CORPS, MARINE CORPS ORDER 1300.8P, encl. (11)(12 Aug. 1988) (Marine Corps Personnel Assignment Policy). The DOD's statistics state that 90% of Army job skills comprising 61% of the force are open to women, 83% of Navy job skills comprising 60% of the force are open to women, 80% of Marine job skills comprising 20% of the force are open to women, and 95% of Air Force job skills comprising 97% of the force are open to women. Memorandum, Office of the Assistant Secretary of Defense, *supra* note 32.

³⁵For general accounts of the Commission's recommendations see *Women in Combat: Maybe? Yes*, N.Y. TIMES, Nov. 28, 1992, at 118; Melissa Healy, *Ban Urged on Women in Most Combat Roles*, L.A. TIMES, Nov. 4, 1992, at A1; Rowan Scarborough, *Clinton Likely to Face Women in Combat Decision*, WASH. TIMES, Nov. 18, 1992, at A3.

³⁶See Melissa Healy, *Navy Secretary Backs Women in Combat Role*, L.A. TIMES, Jan. 7, 1993, at A15.

women into jobs that previously have been dominated by men. In 1981, Congresswoman Patricia Schroeder wrote the following passage about the pervasive sexual harassment problem stemming from the unequal treatment of women in the military:

Sexual harassment is an every day part of the lives of many military women. ... Women complain of unsolicited and unwelcomed advances by male soldiers that often go unpunished, and mess hall stories that often force them to eat off base. Such harassment will probably continue until women are fully accepted as equal and able members of the armed forces.³⁷

Ten years later, another researcher of sexual harassment in the Navy made the exact same conclusion. "[S]exual harassment flourishes in an atmosphere where women are not accepted as full-fledged members of the established group; where the institutional character of the organization encourages a 'warrior mentality'; and where women's value and worth to the organization is perceived to be in doubt."³⁸

C. The Sexual Harassment Research

Much of the support for the conclusion that sexual harassment is a major work place problem comes from extensive sociological research that began in 1980 when the United States Merit Systems Protection Board (MSPB) conducted a survey of 23,000 civilian employees to determine the extent and nature of sexual harassment in the federal work place.³⁹ This study asked federal employees whether they had experienced within a two-year period any of the following categories of harassing behavior: (1) uninvited pressure for sexual favors; (2) uninvited and deliberate touchings, leaning over, cornering or pinching; (3) uninvited sexually suggestive looks or gestures; (4) uninvited pressure for dates; (5) uninvited sexual teasing, jokes, remarks, or questions; and (6) uninvited letters, phone calls, or materials of a sexual nature.⁴⁰ Forty-two percent of the female respondents and fifteen percent of the male respondents reported experiencing one or more of the delineated forms of uninvited sexual attention that the survey equated to sexual harassment during the 1978 to 1980 study period.⁴¹ Despite finding that sexual harassment was so

³⁷ENCYCLOPEDIA AMERICANA ANNUAL 579 (1981).

³⁸Kathleen A. Krohne, *The Effect of Sexual Harassment on Female Naval Officers* 176 (1991) (unpublished Ed.D. dissertation, University of San Diego).

³⁹OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, U.S. MERIT SYSTEM PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE 2* (1981) [hereinafter *SEXUAL HARASSMENT IN THE WORKPLACE*].

⁴⁰*Id.* at 4, 26.

⁴¹*Id.* at 4-5.

extensive, only three percent of the women who reported being sexually harassed stated that they filed any formal reports about the incidents.⁴²

In 1988, the MSPB performed a follow-up study of 13,000 civilian employees with very similar results. Again forty-two percent of women reported "uninvited sexual attention."⁴³ Both MSPB studies tried to quantify the dollar costs of sexual harassment in terms of expenses due to replacing employees who leave federal service because of sexual harassment; sick leave payments stemming from physical, emotional, or psychological trauma; lowered productivity; and litigation expenses. The 1981 report tagged the cost to the federal taxpayer at \$189 million for two years of harassment.⁴⁴ By 1988, that cost had risen to \$267 million for the two-year study period.⁴⁵ These studies generally led to the conclusion that sexual harassment was a pervasive problem in the federal workplace.

In turn, the military began to study sexual harassment in the services. A 1980 study of ninety enlisted women in the Navy revealed that ninety percent claimed to have been verbally harassed, and sixty-one percent physically harassed by their co-workers. Supervisors reportedly verbally harassed fifty-six percent and physically harassed twenty-eight percent of the sample group. As in the MSPB survey, most victims said they did not report the incidents of harassment. The reasons given for not reporting were that they handled the problem themselves, they were afraid to report the incident, they did not feel the harassment was serious enough to report, they did not know how to report, or they were too embarrassed to report.⁴⁶ A survey of almost 15,000 enlisted Air Force men and women conducted in 1985 found that twenty-seven percent of females and seven percent of males had been sexually harassed over a four-week period prior to the questioning.⁴⁷ In the Army, a 1978 questionnaire sent to ninety-one enlisted women assigned to the Signal Corps in West Germany reported that more than fifty percent had

⁴²*Id.* at 11.

⁴³Office of Merit Systems Review and Studies, U.S. Merit System Protection Board, *Sexual Harassment in the Federal Workplace: An Update 1-2 (1988)* [hereinafter *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE*].

⁴⁴*SEXUAL HARASSMENT IN THE WORKPLACE*, *supra* note 39, at 75-79.

⁴⁵*SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE*, *supra* note 43, at 39-40.

⁴⁶Patricia J. Reily, *Sexual Harassment in the Navy 33-34 (1980)* (unpublished Master's thesis, Naval Postgraduate School, Monterey, Cal.).

⁴⁷William Canny, *Sexual Harassment Within the USAF Enlisted Force viii (April 1986)* (unpublished manuscript, on file with the Air Command and Staff College, Air University, Maxwell AFB, Ala.).

been sexually harassed by their supervisors.⁴⁸ A random survey of 512 female soldiers performed by the Army Audit Agency reported that sixty-six percent of the female enlisted soldiers either had been victims or witnessed incidents of sexual harassment.⁴⁹ Reports by the Defense Advisory Committee on Women in the Service highlighted numerous instances of sexual harassment. Eventually, a SECDEF Task Force recommended a DOD survey, which was conducted world-wide in 1988 and 1989.⁵⁰

This survey, building on the methodology and questions asked in the MSPB surveys, was sent to over 35,000 service members, with approximately 20,000 questionnaires returned.⁵¹ The study attempted to take into account the military rank structure, and that service members are theoretically always on duty.⁵² The survey found that sixty-four percent of females and seventeen percent of males (officers and enlisted) had experienced at least one of the forms of sexual harassment identified in the MSPB survey at least one time in the one-year survey period.⁵³ Verbal abuse was by far the most common form of harassment, with fifty-two percent of female respondents acknowledging experiencing it.⁵⁴ The survey also reported that five percent of female harassment victims reported incidents of actual or attempted rape or assault, and twelve percent reported pressure exerted for sexual favors.⁵⁵ As in the MSPB study, few victims took formal action against the perpetrators. In the DOD survey, only ten percent of the female victims acted formally, with sixty-four percent of those who did not act formally stating they did not because they resolved the problem themselves or they thought they could resolve the problem themselves.⁵⁶

Another survey, this time done Navy-wide, was administered in September 1989. Although again modeled after the MSPB

⁴⁸Jon S. Wheeler, *Sexual Harassment: A Military Response to a Military Problem 18* (Feb. 1983) (unpublished manuscript, on file with the Air War College, Air University, Maxwell AFB, Ala.).

⁴⁹Hurst, *75% of Army Women Cite Sexual Harassment*, *ARMY TIMES*, Apr. 5, 1982, at 1.

⁵⁰Melanie Martindale, *Sexual Harassment in the Military: 1988*, at 1 (Sept. 1990) (unpublished report, on file with the Defense Manpower Data Center, Arlington, Va.).

⁵¹*Id.* at 4-5.

⁵²John B. Pryor, *Sexual Harassment in the United States Military: The Development of the DOD Survey 8* (Sept. 1988) (unpublished manuscript, on file with the Defense Equal Opportunity Management Institute, Patrick AFB, Fla.).

⁵³Martindale, *supra* note 50, at 11.

⁵⁴*Id.* at 15.

⁵⁵*Id.* at 14.

⁵⁶*Id.* at 36-38.

survey, this survey asked specifically whether the participants had ever experienced sexual harassment as defined in the SECDEF Memorandum of 20 July 1988.⁵⁷ The survey (with 5619 completed questionnaires), again found that forty-two percent of female enlisted personnel and twenty-six percent of the female officers said they had been sexually harassed within the previous year, either on duty or while located on a base or ship while they were off duty.⁵⁸ Again, the vast majority of the harassment was in the nature of unwanted sexual teasing, jokes, looks, etc. Consistent with the DOD survey, only six percent of the enlisted female respondents and one percent of the officer female respondents reported experiencing the most serious form of sexual harassment—actual or attempted rape or assault.⁵⁹

The survey confirmed that junior enlisted (sailors in the pay grades of E-2 and E-3) were the most likely candidates to experience harassment (forty-nine percent), with the percentages decreasing steadily until the rate for more senior officers (commanders and captains with the pay grades O-4 to O-6) declined to one percent.⁶⁰ Almost all the perpetrators were men.⁶¹ Again, the typical victim response was to ignore the behavior. The female enlisted reporting rate was only twenty-four percent, and the female officers reported at an even lower twelve percent rate.⁶²

Research similar to the surveys noted above continues to be conducted. A follow-up to the DOD survey is to be administered in 1993.⁶³ The data from the survey research conducted thus far clearly indicate that sexual harassment is a problem that must be addressed by military leadership. The highest levels of the military bureaucracy have, in turn, directed that policy initiatives be implemented as a result of the survey data. Former Secretary of Defense Cheney relied on the survey results to conclude that stronger steps needed to be taken to eradicate sexual harassment. He demanded that each DOD component implement a zero-tolerance policy for sexual harassment, and that annual reports on the implementation and effectiveness of the policies be

⁵⁷ Amy L. Culbertson et al., *Assessment of Sexual Harassment in the Navy: Results of the 1989 Navy-wide Survey 7-8 (Mar. 1992)* (unpublished manuscript, on file with the Navy Personnel Research and Development Center, San Diego, Cal.).

⁵⁸ *Id.* at 9.

⁵⁹ *Id.* at 9-10.

⁶⁰ *Id.* at 12.

⁶¹ *Id.* at 15.

⁶² *Id.* at 17.

⁶³ Memorandum, Carl J. Dahlman, Deputy Assistant Secretary of Defense to Assistant Secretaries of the Army, Navy, and Air Force for Manpower and Reserve Affairs (Jan. 14, 1993) (on file with author).

submitted.⁶⁴ In turn, the bureaucracy has responded with numerous initiatives to correct the perceived problems.⁶⁵

D. Publicized Cases of Crimes Against Women in the Military: Tailhook and Other Abuses

While the survey data regarding sexual harassment in the military have been available for more than ten years, media coverage of certain high-profile instances of "sexual harassment" have brought increased attention to the issue. The first highly publicized incident was the case of the nineteen year-old female midshipman at the United States Naval Academy in Annapolis, Maryland, who was physically chained to a urinal by two male midshipmen, while other males photographed and taunted her. The incident occurred on December 8, 1989. The two midshipmen who were the primary abusers received only administrative punishments of demerits and liberty restrictions for their acts of misconduct. The victim subsequently resigned from the Academy in May 1990, stating that she was chagrined at the delays in fully investigating the abuse and outraged at what she considered inadequate punishment for the perpetrators.⁶⁶

Following closely on the heels of the Naval Academy scandal were allegations of rapes, sexual assaults, and violations of anti-fraternization rules at the Orlando, Florida, Naval Training Center. News media accounts reported that at least twenty-four cases of rape or sexual assault were reported to Navy officials during 1989 and 1990, but few of the cases were prosecuted criminally.⁶⁷

Even though the Navy appears at the forefront of addressing the sexual misconduct problem, it has not been alone. For

⁶⁴Memorandum from Dick Cheney, Secretary of Defense, to all major DOD components (July 12, 1991) (on file with author).

⁶⁵As an example, the 1992 Navy annual report included the following list of actions taken to combat sexual harassment: (1) mandatory administrative processing for a substantiated incident of aggravated sexual harassment; (2) forwarding to the Secretary of Defense the proposal to create the specific UCMJ sexual harassment crime; (3) the accomplishment of mandatory training for over one million naval service members (active and reserve) on core values, including prevention of sexual harassment; (4) establishment of a Standing Committee on Military and Civilian Women in the Department of the Navy to enhance the roles of women; (5) approval of 80 recommendations from that Committee; and (6) totally revamping the criminal and administrative investigatory arms of the Navy in response to the perceived failures of the Tailhook investigation. Memorandum from Barbara S. Pope, Assistant Secretary of the Navy (Manpower and Reserve Affairs) to Assistant Secretary of Defense (Force Management and Personnel) (Nov. 25, 1992) (on file with author).

⁶⁶See, e.g., *Navy Cadet Quits Over Prank Probe*, CHICAGO TRIB., May 14, 1990, at C9; Molly Moore, *Navy, Congress Open Probes of Harassment at Annapolis*, WASH. POST, May 18, 1990, at A1.

⁶⁷See, e.g., Molly Moore, *Navy Failed To Prosecute in 6 Rape Cases; Probe Finds Laxity on Sex Offenses at Florida Base*, WASH. POST, Oct. 22, 1990, at A1.

instance, the media reported that a recent Freedom of Information Act request to the Army revealed that from 1987 to 1991, 484 female soldiers were raped while on active duty, including seven who performed duties in the Persian Gulf during Operations Desert Shield or Desert Storm.⁶⁸ Additionally, the Air Force recently was accused of insensitivity to the problems of women when Congresswoman Schroeder revealed that Air Force criminal investigators were trained to use a questionnaire that was designed to prove that women who reported sex offenses were lying. On September 23, 1992, the Secretary of the Air Force ordered that the use of the questionnaire be discontinued.⁶⁹

By far, however, the most notorious instances of "sexual harassment" in the military stemmed from the Tailhook Association convention held at the Las Vegas Hilton Hotel in September, 1991. The Tailhook Association is a private organization comprised of active, retired, and reserve naval and Marine Corps aviators, as well as defense contractors, and others involved in naval aviation. The Association sponsors an annual professional convention which, in the past, received considerable indirect Department of the Navy support. These conventions are well known in the aviation community for parties involving drunkenness and less-than-gentlemanly conduct.⁷⁰

Over 5000 people attended the September 1991 convention, including several of the senior leaders of the Navy. The Secretary of the Navy spoke at one of the sessions, and attended some of the social activities. The Chief of Naval Operations was also present, as were twenty-nine other active duty admirals, two active duty Marine Corps generals, three Navy Reserve admirals and numerous retired flag officers.⁷¹

Allegations of crimes and inappropriate conduct at the 1991 Tailhook Convention first surfaced in October 1991, when a

⁶⁸See, e.g., *Women in Army Face 50% Higher Chance of Rape*, ATLANTA J. & CONST., Dec. 30, 1992, at A3.

⁶⁹See, e.g., *Air Force Suspends Use of Sex-Assault Checklist*, WASH. TIMES, Sept. 23, 1992, at A2; *Why Women Need Power*, ATLANTA J. & CONST., Sept. 26, 1992, at A12.

⁷⁰Office of Inspector General, DOD, Tailhook 91; Part 1—Review of the Navy Investigations 1-2 (Sept. 1992) [hereinafter DOD IG Report Part 1]. At least as far back as the 1985 convention, the drunkenness and "lurid sexual acts" occurring at the conventions were known to high ranking Navy officials. The reputation of the conventions actually must have been considerable because the President of the Tailhook Association, in preparation for 1991 Tailhook Convention, sent letters to various aviation community officers decrying damage done in the past to the hotel facilities, underage drinking, and problems with late night "gang mentality." *Id.* encl. 2.

⁷¹*Id.* at 3-5, 31; Office of Inspector General, DOD, Tailhook 91; Part 2: Events at the 35th Annual Tailhook Symposium X-8 (Feb. 1993) (released publicly Apr. 23, 1993) [hereinafter DOD IG Report Part 2].

female naval aviator, Lieutenant Paula Coughlin,⁷² wrote a letter to the Assistant Chief of Naval Operations complaining that she had been physically and sexually assaulted by a group of drunken aviators who formed a "gauntlet" in a hotel corridor.⁷³ Subsequent investigations disclosed that various women who had the misfortune of entering this hallway were attacked by large groups of male aviators who pushed them through the gauntlet grabbing at their buttocks, breasts, and crotches.⁷⁴

In addition to the "gauntlet," many aviation squadrons sponsored "hospitality" suites at the hotel during the convention. A great deal of drunken and lewd behavior apparently occurred in these hospitality suites, including indecent exposures by both men

⁷²Lieutenant Coughlin is an aviator, and at the time of the 1991 Tailhook Convention, she was an aide to an admiral who was attending the Convention. See H. G. Reza, *Woman Officer in Tailhook Incident Files Suit*, L.A. TIMES, Jan. 22, 1993, at B8.

⁷³DOD IG Report Part 1, *supra* note 70, at 4. Apparently the gauntlet was a tradition at past conventions, and it formed rather spontaneously throughout the convention whenever the necessary components of the gauntlet (females unexpectedly coming into the vicinity of drunken aviators in hotel passageways) presented themselves. DOD IG Report Part 2, *supra* note 71, at VI-1 to VI-3. A Navy commander described the gauntlet as follows:

My definition of the Gauntlet—it is a term that I've heard used at Tailhook or around Tailhook for several years. And I believe it comes from an old Clint Eastwood movie of the same name, about a street or an avenue that starts wide and narrows into a funnel area that's hard to get through. I think that's where the term "The Gauntlet" originated, in regards to Tailhook.

And the Gauntlet would be pretty much in progress on late Friday or late Saturday nights, and it would consist of again, my estimate, two to three hundred young people—young men. And that's just my estimate. I can tell you the hallway—probably as long as maybe 30 yards or so—is absolutely packed with bodies.

And I would say the majority of them are between 21-to-26-year-old young men, mostly on the lower, probably the 21-24-year olds and mostly, in my judgement, just by the attendance at Tailhook, mostly, young Naval officers, but also Marine officers and some Air Force guys; and I did see some people there in '91 that, by their dress and their hair, were not in the military at all. They were civilians that came from the local areas to attend the party.

The group mainly stands out there and drinks and chants and sings songs. And, on the occasion when a female would pass through the area, they would chant or, as it occurred on the late Saturday night, they would grab a girl's butt or breasts, apparently, as she went through.

That's, I guess, the best way I can describe The Gauntlet.

Id. at VI-3 to VI-4.

⁷⁴DOD IG Report Part 1, *supra* note 70, at 4. During the course of the extensive Tailhook investigations, at least 90 individuals (including both naval officers and civilians) were identified as being victims of indecent assaults. DOD IG Report Part 2, *supra* note 71, at VI-13 to VI-16. Several nonsexual assaults, with accompanying injuries, resulted from the general debauchery. *Id.* at VI-16 to VI-17.

and women, viewing of pornographic movies, public shaving of women's legs and pubic areas, and drinking alcohol from dispensers that resembled phallic devices.⁷⁵

While the Navy and the Secretary of the Navy⁷⁶ had official "zero-tolerance" policies on sexual harassment, their having knowledge about the past activities at various Tailhook conventions, and their being present at the 1991 Tailhook Convention, raised serious questions about whether members of the top Navy leadership actually sanctioned and condoned this type of sexual harassment. For example, the female aviator who was assaulted by the gauntlet reported the treatments to her admiral and he essentially took no action.⁷⁷

Accordingly, the 1991 Tailhook Convention can be viewed as the culminating point in the Navy of sexual misconduct, including assaults, a hostile environment for females, and a lack of supervisory response to sexual harassment. Moreover, despite expending enormous resources in investigating the events at the 1991 Tailhook Convention—as well as investigating the investigators—as of Spring 1993, no disciplinary action had been taken against any of the perpetrators of the offenses at the convention or of any Navy or Marine Corps officials who allowed the activities to occur.⁷⁸

⁷⁵DOD IG Report Part 1, *supra* note 70, at 4. The indecent exposures consisted of behavior in three general categories: "streaking," "mooning," and "ballwaking." The streaking involved male officers running naked through various occupied parts of the hotel. Streaking had been a persistent problem at Tailhook conventions. DOD IG Report Part 2, *supra* note 71, at VII-1 to VII-2. The "mooning" consisted of both males and females exposing their buttocks to be viewed by others at the convention. Instances of mooning were frequent. *Id.* at VII-2. Fourteen military officers were identified as having "ballwalked during the convention, which is the public exposure of one's testicles. *Id.* at VII-2 to VII-3.

⁷⁶Then Secretary of the Navy Garrett reportedly visited some of the hospitality suites, one of which had a rhinoceros phallic device dispensing white Russian drinks to women after they either simulated masturbating or performing fellatio on it. DOD IG Report Part 1, *supra* note 70, at 26, 30-31.

⁷⁷Reza, *supra* note 72.

⁷⁸The DOD IG Report Part 1, which examined the Navy's internal investigations of Tailhook and was released in September 1992, severely criticized the Undersecretary of the Navy, the Judge Advocate General of the Navy (Navy JAG), the Commander, Naval Investigative Service (NIS), and the Navy Inspector General. DOD IG Report Part 1, *supra* note 70, at 31-32. Subsequently, the Acting Secretary of the Navy obtained the resignation of the Commander, NIS, and reassigned the admiral who had been the Inspector General. Melissa Healy, *No Further Punishment for Two Admirals*, L.A. TIMES, Oct. 27, 1992, at A13. Although the Acting Secretary of the Navy publicly stated that the Navy JAG was resigning because of the Tailhook situation, the Navy JAG had announced plans to retire prior to the issuance of the report, which was critical of him. J. Robert Lunney, Interview With RADM John E. Gordon, Immediate Past Judge Advocate General of the Navy, NAVAL RESERVE ASS'N NEWS, Jan. 1993, at 7, 10. Even before the issuance of the Navy IG Report Part 1, Secretary of the Navy Garrett,

Other media reports of mistreatment of women in the armed forces are also easy to find. These publicized incidents are pertinent to this article for two reasons. First, the cascading incidents, especially in the Navy, have led to a public perception that sexual harassment is rampant in the military and that something needs to be done. Second, examination of these highly publicized cases, such as Tailhook, Orlando, and the Naval Academy incident, reveals that the problem is not so much traditional work-place sexual harassment, but is instead a failure of leadership to identify that serious sex crimes are being committed in the military environment and a refusal to prosecute the cases in a timely and effective manner. Despite the fact that the conduct generally has been assaultive in nature or involved abuses of position by superiors, discussion of the issues lumps the behavior into the broad category of "sexual harassment." By this amalgamation of criminal conduct into a generalized concept of sexual harassment, the true essence of the conduct is distorted.

IV. The Navy Regulatory Criminalization of Sexual Harassment

A. The Regulatory Scheme: Making Ambiguous Hostile Environment Conduct Criminal

On January 6, 1993, the Navy published a new regulation prohibiting sexual harassment. This regulation is unique in that it specifically criminalizes conduct as sexual harassment per se, as opposed to prosecuting underlying conduct that may be interpreted as sexual harassment but, in any case, violates other established criminal statutes. This section of this article will describe the most pertinent aspects of the Navy regulation and attempt to identify some underlying problems with the approach the Navy has chosen to pursue in criminalizing sexual harassment.

The regulation applies to all Department of the Navy (DON) personnel—civilian as well as military. It establishes an education, training, and recording system to track incidents of sexual harassment. It also provides mandatory administrative processing requirements in certain instances for uniformed members. The crux of the regulation, however, is in the paragraph entitled "Accountability."

No individual in the DON shall:

who was present at the 1991 Tailhook Convention, had resigned on June 26, 1992, under pressure from the scandal. Eric Schmitt, *Friends See Secretary as Honorable But Ill-Served*, N.Y. TIMES, June 27, 1992, at 17.

(1) Commit sexual harassment, as defined in enclosure (1);⁷⁹

(2) Take reprisal action against a person who provides information on an incident of alleged sexual harassment;

(3) Knowingly make a false accusation of sexual harassment; or

(4) While in a supervisory or command position, condone or ignore sexual harassment of which he or she has knowledge or has reason to have knowledge.⁸⁰

Paragraph 8c of the regulation states that the above provisions are punitive in nature for military personnel and that “[t]he prohibitions in subparagraph 8b apply to all conduct which occurs in or impacts a DOD working environment as defined in enclosure (2). The reasonable person standard as defined in enclosure (2) shall be used to determine whether a violation of these provisions has occurred.” As defined by the enclosure, “working environment” is defined as follows:

[T]he workplace or any other place that is work-connected, as well as the conditions or atmosphere under which people are required to work. Examples of work environment include, but are not limited to, an office, an entire office building, a DOD base or installation, DOD ships, aircraft or vehicles, anywhere when engaged in official DON business, as well as command-sponsored social, recreational and sporting events, regardless of location.⁸¹

The “reasonable person standard” is defined as follows:

An objective test used to determine if behavior constitutes sexual harassment. This standard considers what a reasonable person’s reaction would have been under similar circumstances and in a similar environment. The reasonable person standard considers the recipient’s perspective and not stereotyped notions of acceptable behavior. For example, a work environment in which sexual slurs, the display of sexually suggestive calendars, or other offensive sexual behavior abound

⁷⁹Enclosure (1) is the definition of sexual harassment issued in the SECDEF Memo of 20 July 88. See *supra* note 25 and accompanying text. This is an expansion of the EEOC definition because it extends the hostile environment type of sexual harassment beyond the traditional **work** environment.

⁸⁰SECNAV *INSTR.* 5300.26B, *supra* note 4, para. 8b.

⁸¹*Id.* encl. (2), para. 13.

can constitute sexual harassment even if other people might deem it harmless or insignificant.⁸²

Accordingly, the scope of the prohibition is enormous. All *quid pro quo*, and hostile environment conduct now is criminalized formally for naval personnel. The hostile environment conduct must relate to the military work environment, but that term covers conduct that in almost any way can relate to the involvement of the military. Furthermore, commanders and supervisors who fail to ferret out sexual harassment in areas under their cognizance are also liable. Finally, taking reprisals against a complainant or anyone who supplies information about sexual harassment violates the regulation, as does reporting a false sexual harassment allegation.⁸³

The prohibitions against *quid pro quo* sexual harassment are noncontroversial, because they clearly involve abuses of authority and they duplicate prohibitions already in effect.⁸⁴ The initial difficulty posed by the regulation is in its criminalization of hostile environment sexual harassment. The regulation attempts to define this new crime in three separate places but, in reality, it only serves to confuse what is criminally forbidden. The result is that the standard of criminality is hopelessly vague and probably constitutionally defective.

To determine what constitutes the offense of hostile environment sexual harassment, numerous interrelated definitions must be examined. First, the general definition of sexual harassment (enclosure (1)) forms the basis for the prohibition. The opening words of this definition state that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" constitute a violation when "such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment." The hostile environment is described further in the last sentence as "deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature. . . ." The focus of the hostile environment is therefore the "unwelcome" nature of the sexual conduct.⁸⁵

⁸²*Id.* encl. (2), para. 6.

⁸³*Id.* para. 8.

⁸⁴See *infra* text accompanying notes 189-191, 215-222.

⁸⁵A difficult issue for the factfinder in hostile environment sexual harassment prosecutions under the regulation will be whether the offensive conduct is "sexual" in nature. The regulation definition of "sexual nature" states that the behavior need not necessarily be "overtly" sexual if it creates a hostile environment. SECNAV INSTR. 5300.26B, *supra* note 4, encl. (2), para. 11. This circular reasoning is sure to generate much litigation.

“Unwelcome” is defined as “[c]onduct that is not solicited and which is considered objectionable by the person to whom it is directed and which is found to be undesirable or offensive using a reasonable person standard.”⁸⁶ The main characteristic of unwelcome conduct is that the *person perceiving* the conduct finds it objectionable. The definition attempts to allay the completely subjective aspect of this determination by also requiring that the conduct be undesirable or offensive using the “reasonable person” standard. The “reasonable person” definition initially states that it is an objective standard, but it has a caveat. It emphasizes that the reasonable person has the recipient’s “perspective,” “not stereotyped notions of acceptable behavior.”⁸⁷ The meaning of this phrase is inscrutable, and the example that the definition provides does nothing to clarify the issue. In the example, sexual harassment can exist under the reasonable person standard when “offensive sexual behavior” occurs “even if other people might deem it to be harmless or insignificant.”⁸⁸ The implication, therefore, is that a hostile environment may exist even if the people working in the environment are so insensitive that they are not offended by conduct that should offend them. Such a rule, however, seems to run counter to the requirement that the conduct be “unwelcome” by the recipient. The standard is, therefore, internally inconsistent.

“Unwelcomeness” is a subjective reaction of how certain *third parties* feel about the unsolicited acts or words of an actor. It is a concept developed by and borrowed from Title VII employment discrimination law. While all surrounding facts and circumstances must be evaluated to determine if the recipient actually welcomed the conduct,⁸⁹ this does not turn the “unwelcomeness” test into an objective inquiry. The analysis still focuses on the feelings of the recipient. The criminality of an actor’s conduct turns on the subjective, and perhaps never manifested, feelings of third parties. The reasonable person standard, however, is normally a completely objective test that seeks to determine if in light of societal norms certain conduct falls below acceptable levels. By cross-referencing these two distinct concepts, determining what the legal standard is for

⁸⁶ *Id.* encl. (2), para. 12.

⁸⁷ *Id.* encl. (2), para. 6.

⁸⁸ *Id.*

⁸⁹ In *Vinson*, the Supreme Court held that evidence of a recipient’s sexually provocative dress or speech is relevant to whether the conduct is unwelcome. *Vinson*, 477 U.S. at 69.

imposing criminal liability for hostile environment sexual harassment is difficult or impossible.⁹⁰

Although not explicitly stated in the regulation, the merging of the unwelcomeness and reasonable person concepts may be an attempt to develop a "reasonable woman standard." Several Title VII cases have adopted such a standard because courts perceive that the gender-neutral reasonable person standard is a male-biased standard that systematically ignores the perceptions and reality of women.⁹¹ Any such movement to place a gender qualification on the reasonableness standard in criminal law is sure to increase difficulties in defining criminality.

What is referred to as hostile environment sexual harassment actually has two components. The unwelcome conduct can "interfere" with an individual's performance or create a hostile work environment. In the first instance, the perpetrator can be guilty even though he or she has no intent to offend *and* has received no manifestation from the "victim" that he or she has offended. For this offense, none of the definitions give any reference to the "reasonable person standard." Accordingly, a person could be guilty, for example, merely by asking another—who deems the conduct unwelcome—out on dates, generating attention that causes the recipient to not be able to do his or her job as well as he or she formerly had performed it. Therefore, for this offense, essentially no standard of criminality exists.

The sexual harassment definition has one other important ambiguity. The last sentence states that "deliberate or repeated unwelcome" conduct is a violation. The word "deliberate" is a special mental element akin to specific intent. The remainder of the sexual harassment definition has no intent element. Nevertheless, it must be deliberate "unwelcome" conduct. "Unwelcomeness," however, is determined by the subjective feelings of the recipient—feelings that the perpetrator may never be capable of knowing. Consequently, the regulation simply creates confusion about the nature, if any, of a scienter requirement.

⁹⁰In *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990), a convening authority attempted to prosecute a soldier for sexual harassment by incorporating the nonpunitive provisions against sexual harassment contained in the Army equal opportunity regulation into the punitive Army standards of conduct regulation. The Army Court of Military Review rejected this incorporation for various reasons, including that a prosecution for the equal opportunity version of sexual harassment permits conviction "on mere proof that a victim subjectively found an accused's conduct offensive. ..." *Id.* at 923. This case supports the view that the similar standard of criminality contained in the regulation, in that it is tied to the subjective perceptions of the victims, is offensive to principles of military law.

⁹¹See *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1990); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987).

In sum, the primary sexual harassment definition, and the regulation's amplifying definitions, seem to blur the legal standard for hostile environment sexual harassment. Perhaps in recognition of the ambiguity of the concept, the drafters of the regulation provided, as enclosure (3), a document that they term "Range of Behaviors Which Constitute Sexual Harassment." Although it is not a part of the punitive aspect of the regulation, it apparently is furnished to clarify what conduct is criminal and what conduct is not. In reality, the enclosure merely demonstrates the failure of the regulation to define a standard with sufficient certainty to meet constitutional standards.⁹²

Paragraph 5 of enclosure (3) is the pertinent aspect of the document. In this paragraph, the drafters attempted to explain what conduct is criminal by analogizing sexual harassment to a traffic light. Certain conduct is "green" that is, conduct which clearly is not sexual harassment. Examples of "green" conduct include social interaction, counselling on military appearance, and polite compliments. At the other extreme is "red" conduct—that is, conduct which clearly is sexual harassment and criminal, such as quid pro quo actions, sexually explicit pictures (including calendars or posters),⁹³ or sexually assaultive conduct.⁹⁴

"Yellow Zone" conduct is behavior that "may be sexual harassment." It is described as follows:

Yellow zone. Many people would find these behaviors unacceptable, and they could be sexual harassment: violating personal "space", whistling, questions about personal life, lewd or sexually suggestive comments, suggestive posters or calendars, off-color jokes, leering, staring, repeated requests for dates, foul language, unwanted letters or poems, sexually suggestive touching, or sitting or gesturing sexually.

The enclosure concludes with the following pertinent admonition: "Any time sexual behavior is introduced into the work environment or among co-workers, the individuals involved are on notice that the behavior may constitute sexual harassment."⁹⁵

⁹²See *infra* text accompanying notes 96-117.

⁹³Apparently, even when the drafters indicate that the conduct is always criminal, the conduct may not even rise to the level of the regulation's standard for hostile environment. For instance, a calendar in an all-male working area aboard a ship at sea probably would not create a hostile environment, although this may be an instance where the insensitive sensibilities of the sailors fail the "reasonable person standard." See *supra* text accompanying notes 86-88.

⁹⁴Interestingly, the drafters wrote that "the most severe forms of sexual harassment constitute criminal conduct, e.g. sexual assault. ..." SECNAV INSTR. 5300.26B, *supra* note 4, encl. (3), para. 5c. While that is true, because of this regulation, all the less severe forms of conduct also become criminal.

⁹⁵SECNAV INSTR. 5300.26B, *supra* note 4, encl. (3), note.

In a society in which sexuality is pervasive, enclosure (3) serves only to compound the obvious difficulties in defining a standard that would criminalize "stares," "leers," and other "sexual behavior." The publication of the regulation, with the explicit warning about sexual behavior, may provide adequate notice that sexual harassment is prohibited in the military, but it does not give adequate notice about what conduct is sexual harassment. In reality, the regulation poses serious vagueness problems.

B. Unconstitutional Vagueness

A law is unconstitutionally vague and offensive to due process if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. ..." ⁹⁶ Citizens are entitled to have a clear enunciation of what the law commands and what it forbids. ⁹⁷ The policies prohibiting unduly vague criminal statutes have been set forth succinctly by the Supreme Court in *Grayned v. City of Rockford*: ⁹⁸

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the lawful zone' ... than if the boundaries of the forbidden areas were clearly marked."

⁹⁶*United States v. Harriss*, 347 U.S. 612, 617 (1954). Similarly, in *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), the Court stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

⁹⁷*Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

⁹⁸408 U.S. 104, 108-09 (1972) (footnotes omitted).

As implicated by this quote, when a law inhibits the exercise of a constitutionally protected right, the constitutional demand for clarity is even more compelling.⁹⁹

The inability of the Navy regulation to develop a clear standard of what constitutes hostile environment sexual harassment appears to make the regulation a prime candidate for a vagueness challenge. Commission of the offense is dependent upon the subjective reactions of potentially numerous victims, some of whom the actor will not even be aware. Furthermore, in enclosure (3), the acknowledgement of the ambiguity of "yellow zone" conduct only reiterates the vagueness of the regulation. Clearly the regulation specifically affects speech, triggering the heightened degree of clarity that is necessary to pass constitutional muster.

The vagueness doctrine "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision" because inherent ambiguities exist in the English language.¹⁰⁰ This exception to the doctrine, however, does not save the Navy regulation for two reasons. First, the ambiguity is not in the *language* of the regulation, but is instead in the inability of the actor to know beforehand whether his or her conduct will create the hostile environment. Second, the exception apparently does not operate when a freedom of speech issue is at stake.¹⁰¹ The regulation certainly affects speech.¹⁰²

The vagueness doctrine is applicable to military criminal law.¹⁰³ The constitutional standard for determining the clarity of a statute also applies to criminal sanctions contained in regulations.¹⁰⁴ While vagueness concerns often have arisen in the

⁹⁹*Village of Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 489, 499 (1982); *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

¹⁰⁰*Rose v. Locke*, 423 U.S. 48, 50 (1975).

¹⁰¹*Id.* at 50 n.3.

¹⁰²The Supreme Court has recognized that a scienter requirement may mitigate the vagueness of a law. *Village of Hoffman*, 455 U.S. at 499; *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). This principle also has been recognized by military courts. *United States v. Bradley*, 15 M.J. 843, 844 (A.F.C.M.R. 1983); *United States v. Cannon*, 13 M.J. 777, 778 (A.C.M.R.), pet. *denied*, 14 M.J. 226 (C.M.A. 1982). Because basically no intent element exists for the hostile environment aspect of the regulation, the issue of a scienter limitation has no effect on the regulation's constitutionality. The definition of SECNAV INSTR. 5300.26B, *supra* note 4, encl. (1), does have a provision that deliberate unwelcome conduct is sexual harassment. While deliberate conduct obviously can be sexual harassment, the harassing conduct need not be deliberate to satisfy the regulation definition for hostile environment sexual harassment. Therefore, the regulation has no mandatory intent requirement.

¹⁰³*United States v. Soby*, 5 M.J. 160 (C.M.A. 1978); *United States v. Reed*, 24 M.J. 80, 83 (C.M.A. 1987) (Everett, C.J., concurring).

¹⁰⁴*United States v. Mabezza*, 3 M.J. 973, 975 (A.F.C.M.R. 1977).

context of UCMJ Article 92 orders,¹⁰⁵ the principal focus in the military has been vagueness claims arising under UCMJ Articles 133 and 134. The seminal case is *Parker v. Levy*,¹⁰⁶ in which the Supreme Court upheld the two general articles—Articles 133 and 134—against vagueness and First Amendment overbreadth challenges.

In upholding the two general articles, then-Justice Rehnquist stressed several points. First, "the military is, by necessity, a specialized society separate from civilian society"¹⁰⁷ with a legal code that regulates a far broader range of conduct than civilians are subject to under state criminal codes.¹⁰⁸ Second, because Congress has great authority in regulating military affairs, Captain Levy was not permitted to challenge the two articles for being vague as to the conduct of others that marginally might fall outside the statute's parameters because he was clearly on notice that his conduct was unacceptable. In so ruling, the Court wrote, "Because of the factors differentiating military society, we hold that the proper standard for review for a vagueness challenge to the articles of the UCMJ is the standard which applies to criminal statutes regulating economic affairs."¹⁰⁹

While *Parker v. Levy* usually gives the military great leeway, it arguably does not provide the Navy much comfort for its regulation. First, the extraordinary deference shown to the distinct military community is permitted because Congress is given a wider range to legislate. A regulation promulgated by military authorities may not be given such deference. Second, while increased discipline is always something distinctive to the military, the concept of sexual harassment is actually a civilian antidiscrimination scheme that Congress has not seen fit to apply to uniformed personnel.¹¹⁰ Because Congress has enacted numerous far-ranging UCMJ provisions that cover most conduct that could be deemed sexual harassment, the special deference

¹⁰⁵*Id.* at 973 ("show and tell" regulation prohibiting black marketing not vague); *Cannon*, 13 M.J. 777; *Bradley*, 15 M.J. 843 (regulations prohibiting possession of drug paraphernalia not vague when scienter element inferred); *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 31 (C.M.A. 1982) (regulation prohibiting social fraternization at training post withstands vagueness challenge); *Reed*, 24 M.J. 80 (prosecution of failure to report to proper authority known offenses of others as violation of *Navy Regulation 1139* runs afoul of the vagueness doctrine).

¹⁰⁶417 U.S. 733 (1974).

¹⁰⁷*Id.* at 743.

¹⁰⁸*Id.* at 750.

¹⁰⁹*Id.* at 756. The standard for "criminal statutes regulating economic affairs" is described explicitly in *Village of Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 489, 497 (1979), in which the Court said that the "complainant must demonstrate that the law is impermissibly vague in all its application."

¹¹⁰*See supra* note 23 and accompanying text.

given to the military to fill the vagueness gaps does not seem particularly appropriate.

In *Parker*, the Supreme Court looked at interpretations of the law by military courts and commentators, the *Manual for Courts-Martial*, training received in military law by service members, and—probably of most importance—military customs and usages, as a means of narrowing the scope of Articles 133 and 134.¹¹¹ In *United States v. Johanns*,¹¹² a fraternization prosecution against an Air Force captain, the Court of Military Appeals (COMA) ruled that the lack of military customs, usage, and training precluded the prosecution under Article 133 on vagueness grounds, even in light of the relaxed standard of *Parker*. The same contentions appear to be applicable to the Navy regulation, even though the military has made significant efforts to train its personnel on the prevention of sexual harassment.

Much of the debate over constitutional vagueness centers on whether a statute is vague on its face, and therefore should be invalidated *in toto*, or is vague as applied, so that it is challengeable only when the conduct of the defendant falls directly within the ambiguous aspect of the statute.¹¹³ Debating this distinction, however, should not be an obstacle because the concern over sexual harassment is precisely the ambiguous type conduct or, in the words of the regulation, the “yellow zone” conduct. This is behavior that, by definition, is ambiguous. The prohibitions are subject to constitutional vagueness challenges because the conduct cannot be said to fall plainly within the terms of the regulation.¹¹⁴ The danger in enacting such a law is that, if the military moves too far in prosecuting “yellow zone” conduct, service members will have little or no notice of what they can or cannot do. “Yellow zone” conduct therefore becomes whimsically subject to enforcement by law enforcement agents, convening authorities, and prosecutors—the precise danger that the vagueness doctrine guards against.

An example of a case in which the military edged close to the border of the vagueness doctrine was *United States v. Guerrero*.¹¹⁵ In *Guerrero*, a sailor was convicted under Article 134 for cross-dressing. The COMA judges unanimously agreed that the accused was on sufficient notice that “picking-up” a junior sailor and

¹¹¹*Parker*, 417 U.S. at 751-54.

¹¹²20 M.J. 155, 158 (C.M.A. 1985), *cert. denied*, 474 U.S. 850 (1985).

¹¹³*See, e.g., Village of Hoffman Est.*, 455 U.S. at 494-95; *Parker*, 417 U.S. at 756-57; *United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992), *cert. denied*, 1993 U.S. LEXIS 1691 (1993).

¹¹⁴*McGuinness*, 35 M.J. at 152.

¹¹⁵33 M.J. 295 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1173 (1992).

bringing him to the accused's home, where he then propositioned him in drag, was conduct prejudicial to good order and discipline. Senior Judge Everett, however, dissented on vagueness and notice grounds as to a specification that alleged that the accused, in his own home, was casually observed cross-dressing.¹¹⁶ Such conduct is quite analogous to "yellow zone" conduct. While undoubtedly many prosecutions for "red zone" sexual harassment could be constitutionally maintained under the regulation, these offenses also could be prosecuted under standard UCMJ provisions.¹¹⁷ The danger arises in "yellow zone" conduct.

C. Borrowing Title VII Law

In analyzing the hostile environment type of sexual harassment thus far, the analysis has resorted simply to the regulatory definitions. The underlying military sexual harassment definition, however, is merely an adaptation of the concept from Title VII law. Does the Navy regulatory offense incorporate all, part, or none of Title VII law? The regulation does not answer this question.¹¹⁸ Furthermore, Title VII law itself is highly unsettled as to the standard for civil liability for hostile environment conduct. It therefore is not a good model on which to base a new criminal offense.

Two examples deriving from Title VII law will touch on the problem of creating a criminal standard from the borrowed employment discrimination standard. First, in *Vinson*, the Supreme Court added to the EEOC guidelines standard a requirement that the conduct of the harasser had to be sufficiently severe or pervasive that it altered the conditions of employment and created a hostile environment.¹¹⁹ This "severe or pervasive" requirement does not appear to be a part of the regulation's hostile environment prohibition.¹²⁰ If the regulation does not have this requirement, then the criminal standard will be significantly less demanding than the civil standard.

¹¹⁶*Id.* at 299.

¹¹⁷UCMJ Articles 133 and 134 generally have withstood vagueness challenges because they are tied into an already constitutionally approved standard of conduct—that is, service discrediting or prejudicial to good order and discipline. The regulation, however, is not tied to such a constitutionally approved standard.

¹¹⁸SECNAV INSTR. 5300.26B, *supra* note 4, encl. (3), para. 2, provides background information about the Navy sexual harassment policy, including that the definition derives from Title VII law. From this discussion, one can argue that the drafters intended to incorporate employment discrimination concepts into the regulatory offense.

¹¹⁹*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

¹²⁰SECNAV INSTR. 5300.26B, *supra* note 4, encl. (2), para. 9, contains a definition of "severe or pervasive," but these terms are not otherwise used in enclosure (1), or anywhere else in the regulation.

Second, the federal circuits are split over what the standard is for finding severe and pervasive conduct. In three circuits, the courts have held that, to satisfy this element, a plaintiff merely must show that she was offended, and that the conduct would have offended a reasonable victim.¹²¹ In three other circuits, however, the plaintiff additionally must show that she suffered serious psychological injury from the harasser's conduct.¹²²

Whether this serious psychological injury is a necessary prerequisite is the issue the Supreme Court will decide next term in *Harris v. Forklift Systems*.¹²³ Presumably, the drafters of the regulation did not intend to have this type of requirement. Nevertheless, whether Title VII interpretations are part of the military crime is totally unclear. By tying the regulatory crime into civil concepts that are in flux and uncertain, the criminal ambiguity problem is magnified. Additionally, determining how concepts that may be applicable only to civilian employment law are rejected or translated into military criminal law will be difficult.¹²⁴

D. The Regulation and the First Amendment

"Women aren't strong and smart enough to be Navy lawyers. They belong in the kitchen and bedroom, not the courtroom." Although the above statement is stupid, it probably is protected speech under the First Amendment. Using the definitions

¹²¹*Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Burns v. MacGregor Elect. Ind., Inc.*, 955 F.2d 559 (8th Cir. 1992); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

¹²²*Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

¹²³No. 92-1168, 1993 U.S. LEXIS 1937 (Mar. 1, 1993).

¹²⁴The uncertainty in the standard for employment hostile environment cases is illustrated by comparing the results of two similar cases arising in different circuits. In *Rabidue*, 805 F.2d 611, the Sixth Circuit held that posting of nude and partially nude photographs of women in work spaces by male employees did not constitute hostile environment sexual harassment because they had only a "de minimus effect on the plaintiffs work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica. ..." *Id.* at 622. The same type of photo displays were deemed to create a hostile environment in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

The uncertainty in the law is so pronounced that even an organization like the American Civil Liberties Union (ACLU) is divided and confused. Reacting to the *Robinson* decision, the Florida chapter of the ACLU decried the decision as an infringement of First Amendment rights, but the national ACLU organization supported the decision. See Clarence Page, *Pinups Today, Press Tomorrow, It's Not a Pretty Picture*, CHICAGO TRIB., Nov. 6, 1991, at C19; Larry Witham, *Pinup Ruling Splits ACLU*, WASH. TIMES, Nov. 2, 1991, at A1.

contained in the regulation, however, this type of statement would constitute hostile environment sexual harassment.¹²⁵ That the regulation could sweep with such great breadth in a constitutionally protected area poses serious dangers to the First Amendment rights of service members.

An exhaustive survey of First Amendment law, and its relationship to sexual harassment, is beyond the scope of this article. Two law review articles, however, recently have been published—each reaching a different conclusion on the constitutionality of Title VII hostile environment sexual harassment restrictions on freedom of speech.¹²⁶ Professor Marcy Strauss of Loyola Law School argued that First Amendment doctrine should be *modified* to permit a balancing approach such that the value of free speech to the harasser in the workplace would be weighed against the rights of society and women to have equality in the workplace. Under this approach, Professor Strauss found justification for almost all regulation of speech in the workplace.¹²⁷

Professor Kingsley R. Browne of Wayne State University Law School responded to her arguments and concluded that nothing in First Amendment analysis supports the restriction of hostile environment speech. He argues that speech restrictions that are in categories that traditionally have not permitted regulation inevitably infringe upon protected speech. Furthermore, the sexual harassment speech restraints are difficult or impossible to frame so that only "valueless sexist" speech is

¹²⁵The last sentence in the enclosure (1) definition of sexual harassment states that "unwelcome verbal comments ... of a sexual nature" constitute sexual harassment. In the enclosure (2), para. 11, definition of "sexual nature," "sexist remarks or slurs" are prohibited. See SECNAV INSTR. 5300.26B, *supra* note 4, encls. (1), (2).

¹²⁶Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L.L. REV. 1 (1990); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991). Note that Professor Browne begins his article with an example similar to the one this author has used to introduce the speech issue.

¹²⁷Strauss, *supra* note 126, at 4-5, 21. In particular, Strauss concludes that the government's interest in precluding workplace sexist speech outweighs free speech concerns when the offensive speech is aimed at a captive audience or causes discrimination against women. Free speech prevails when the comments are not directed at a particular woman and the statement is not discriminatory. *Id.* The types of speech that generally fall into the category in which the balance is always struck for regulation are "(1) sexual demands or requests; (2) sexually explicit speech directed at the woman employee; [and] (3) degrading speech directed at the employee." *Id.* at 43. The category in which speech rights may prevail is for "sexually explicit or degrading speech or expression that is not directed at the woman, but which she overhears or sees." *Id.* Accordingly, the sexist judge advocate statement likely would be protected speech even under the balancing approach urged by Professor Strauss.

prohibited. Finally, he contends that such restraints may be counterproductive to the goal of decreasing discrimination against women because hearing the baldest forms of offensive speech reveals its lack of merit in the political marketplace of ideas. The voicing of even unpopular and reprehensible ideas must be allowed in a democracy.¹²⁸ Significantly, both scholars agree that restriction of speech rights through Title VII is an issue of major constitutional importance, and that current First Amendment doctrine prohibits the speech limitations that are contained in hostile environment sexual harassment employment law.¹²⁹ Even though the reach of the First Amendment may at times be more narrow for service members, its basic protections are still in force in the military.¹³⁰ Accordingly, the regulation poses serious First Amendment concerns.

Under traditional First Amendment analysis, Congress can limit speech only if the speech is either not entitled to First Amendment protection or a compelling government interest of the highest order exists. Regulation of speech that is obscene,¹³¹ defamatory,¹³² constitutes fighting words or incitement to crime,¹³³ advocates overthrowing the Government by unlawful means,¹³⁴ or hinders a war effort¹³⁵ all have been upheld to varying degrees. Furthermore, regulations that aim not at the content of the speech, but instead merely enforce reasonable time, place, or manner restrictions on expression have been held constitutional.¹³⁶

While First Amendment doctrine is incredibly complex, the basic tenet of the doctrine as enunciated in the military case law derives from the "clear and present danger doctrine." In *United States v. Priest*,¹³⁷ a sailor was court-martialed for publishing diatribes against American military involvement in Vietnam. The COMA expressly stated that "the proper standard for the governance of free speech in military law is still found, we believe, in Mr. Justice Holmes's historic assertion in *Schenck v.*

¹²⁸Browne, *supra* note 126, at 540-43.

¹²⁹Strauss, *supra* note 126, at 21; Browne *supra* note 126, at 531.

¹³⁰*United States v. Priest*, 45 C.M.R. 338 (C.M.A. 1972); *United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979).

¹³¹*Miller v. California*, 413 U.S. 15 (1973).

¹³²*Beauharnais v. Illinois*, 343 U.S. 250 (1952).

¹³³*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹³⁴*Stromberg v. California*, 283 U.S. 359 (1931).

¹³⁵*Abrams v. United States*, 250 U.S. 616 (1919).

¹³⁶*United States v. Grace*, 461 U.S. 171, 177 (1983).

¹³⁷45 C.M.R. 338 (C.M.A. 1972).

United States."¹³⁸ Because of the unique nature of the military and its necessity for discipline, more speech presents "clear and present dangers" and can, therefore, be regulated:

In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.¹³⁹

In *Parker v. Levy*, the Supreme Court affirmed the Priest First Amendment analysis for the military, and quoted with approval the above passage.¹⁴⁰ *Parker* also implied that the "overbreadth doctrine" (although inapplicable to Captain Levy because, as an officer, Articles 133 and 134 clearly prohibited his misconduct) might still be available for use in striking a military regulation when the overbreadth is substantial.¹⁴¹ The "overbreadth doctrine" is essentially an exception to the standing principle that allows a litigant to challenge only a statute or regulation that injures him or her. In the First Amendment arena, the overbreadth doctrine permits a party, under certain circumstances, to challenge the facial constitutionality of a speech limitation as overly broad because it is a violation of someone else's constitutional right. This is permitted even though the regulation applied to the challenging party is not constitutionally deficient.¹⁴² Criminal prohibitions affecting First Amendment

¹³⁸*Id.* at 344. The Priest Court quoted the following famous words of Justice Holmes in *Schenck v. United States*, 249 U.S.47, 52 (1919):

The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

¹³⁹*Priest*, 45 C.M.R. at 344 (internal citations omitted).

¹⁴⁰417 U.S. at 758-59.

¹⁴¹*Id.* at 759-61.

¹⁴²*Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

rights are particularly susceptible to overbreadth analysis because the chilling effects of overly broad regulations will cause the citizenry to steer far short of the edges of criminal conduct and, therefore, unnecessarily refrain from exercising their free speech rights.¹⁴³

Since *Priest*, a review of military case law finds a surprising lack of helpful decisions in the First Amendment area. While several decisions rejected First Amendment challenges to obscenity regulations,¹⁴⁴ the remainder of the cases in which First Amendment issues were raised generally have been disposed of with a citation to *Parker* and a comment about the unique aspects of military life and discipline.¹⁴⁵

Assuming *arguendo* the nonapplicability of the overbreadth doctrine, the regulation safely can withstand First Amendment challenges for hostile environment sexual harassment speech restrictions that are in the nature of quid pro quo, defamation, obscenity, and fighting words.¹⁴⁶ Regulation in these areas is unnecessary, however, because of the constitutionally approved restrictions already contained in other UCMJ provisions. Unfortunately, the regulation sweeps far more speech within its criminal prohibition than just the established categories. All speech that creates the so-called hostile environment is prohibited. This is a potentially vast restriction on free speech that should not be tolerated.

In Professor Browne's opinion, two features of the speech restrictions in Title VII hostile environment law are unconstitutional because of the chilling effect they have on free expression.¹⁴⁷ First, the definition of verbal sexual harassment is simply

¹⁴³*Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965).

¹⁴⁴*United States v. Scoby*, 5 M.J. 160, 162 (C.M.A. 1978); *United States v. Orben*, 28 M.J. 172 (C.M.A.), cert. denied, 493 U.S. 854 (1989); *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

¹⁴⁵*United States v. Reed*, 24 M.J. 80, 82 (C.M.A. 1987) (First Amendment issue not reached, but likely would have been disposed of by *Parker*); *United States v. Womack*, 29 M.J. 88, 91 (C.M.A. 1989) ("safe sex" order not unconstitutional because of the different application of First Amendment in military, citing *Parker*); *United States v. Sartin*, 24 M.J. 873, 874 (A.C.M.R. 1987), pet. denied, 26 M.J. 60 (C.M.A. 1988), (antifraternalization order limiting right to associate is not First Amendment violation, citing *Parker*).

¹⁴⁶The only military justice case that discusses overbreadth is *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), pet. denied, 13 M.J. 31 (C.M.A. 1982). Citing merely to *Parker* and the need for internal military discipline, the Army Court of Military Review rejected the overbreadth claim of a soldier who himself was not subject to a constitutional violation. In *United States v. Adams*, 19 M.J. 996, 998 (A.C.M.R. 1985), an overbreadth challenge was rejected summarily. If overbreadth is deemed appropriate to the analysis, the regulation likely would have to be invalidated *in toto*.

¹⁴⁷Browne, *supra* note 126, at 501-10.

too vague to give sufficient notice as to what words or expressive conduct is prohibited.¹⁴⁸ The regulation suffers this same infirmity.

The second problem area perceived by Professor Browne with the civil restrictions is that because Title VII often places vicarious liability upon employers for the harassment of employees, even more protected speech is chilled. This results in employer's censoring to avoid potential liability. In light of this, employers generally have reacted very forcefully in attempting to prohibit sexual harassment, but still they are being routinely sued.¹⁴⁹ The same censorship and overreaching problems will follow from the criminal respondeat superior provisions of the regulation.¹⁵⁰

The First Amendment concerns valid in the civil arena are even more compelling because the regulation imposes criminal sanctions. Adding to the questions about the constitutionality of speech restrictions in the hostile environment sexual harassment area, is the decision of the Supreme Court in *R.A.V. v. City of St. Paul*.¹⁵¹ In *R.A.V.*, the Court held that a municipal ordinance prohibiting certain "hate" conduct (including expressive conduct) that offended others on the basis of race, color, creed, religion, or gender was facially unconstitutional under the First Amendment. Departing, at least in their methodology, from traditional methods of analyzing a First Amendment issue, Justice Scalia, writing for a five member majority, determined that even though the ordinance proscribed "fighting words," which traditionally can be regulated, it did so in a way that amounted to unconstitutional "content discrimination."¹⁵² The ordinance ran afoul of the First Amendment because it prohibited words on only specifically disfavored topics such as race and gender. Holding that the ordinance was a suppression of views opposed by the majority of the populace because of their content, the Court concluded, "The

¹⁴⁸ *Id.* at 502-03. Professor Browne pointed to *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 624 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), as illustrative of his point. In *Rabidue*, distinguished jurists disagreed over whether a plaque resting on a supervisor's desk that stated "[e]ven male chauvinist pigs need love" could create the hostile environment. Professor Browne asserts that if the judiciary is so uncertain, the citizenry certainly cannot know what they are permitted to say or do. Furthermore, he claims the standard is so vague that different factfinders almost always will be able to find that the same conduct did or did not constitute harassment, and only in the most extreme cases, would they be wrong as a matter of law.

¹⁴⁹ *Id.* at 504-10.

¹⁵⁰ See *infra* text accompanying notes 160-167.

¹⁵¹ 112 S. Ct. 2538 (1992).

¹⁵² *Id.* at 2547-48.

First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”¹⁵³

Strongly reacting to what they perceived to be a new type of First Amendment analysis, the remainder of the Court concurred that the ordinance was unconstitutional because it was overbroad. In the principal concurring opinion, Justice White stated that under the majority’s new “underinclusiveness” theory, “Title VII hostile environment work claims would suddenly be unconstitutional.”¹⁵⁴ Hostile environment sexual harassment would be a violation—not under the traditional First Amendment analysis discussed above—but because the special prohibition on the “disfavored topic” of sexual harassment is a content-based subcategory of discrimination that cannot be prohibited in the absence of prohibiting all harassment nondiscriminatorily.¹⁵⁵ While Justice Scalia attempted to explain that Title VII hostile environment sexual harassment need not fall under the rationale of the opinion,¹⁵⁶ Justice White refuted that explanation.¹⁵⁷

Because even the Supreme Court is unclear as to what effect on First Amendment concepts the *R.A.V.* decision will have—especially in sexual harassment litigation—caution in dealing in this area certainly is justified. As discussed above, the military courts have little experience and precedent dealing with First Amendment issues concerning nonconventional restrictions on speech. Currently pending review at the COMA is a case that may portend how the military will respond to more complex First Amendment challenges. In *United States v. Hartwig*,¹⁵⁸ an officer was convicted of conduct unbecoming an officer and gentleman when he improperly responded to an “any soldier letter” he received during Operation Desert Storm with a letter containing sexual innuendo. His letter was sent to a fourteen-year-old junior high school student. The accused attacked his conviction, claiming that Article 133, as applied, was unconstitutionally overbroad and vague. He claimed that the writing of his return letter was protected speech because it was private and not obscene. Relying principally on *Parker’s* analysis that officers are held to a higher standard of conduct, the Army Court of Military Review determined that the language of the letter was offensive, vulgar,

¹⁵³ *Id.* at 2547.

¹⁵⁴ *Id.* at 2557.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2546.

¹⁵⁷ *Id.* at 2557-58.

¹⁵⁸ 35 M.J. 682 (A.C.M.R.1992), *pet. filed*, No. 93-0131/AR (C.M.A.5 Nov. 1992).

and intended to incite lust. The Court therefore held that Hartwig's "conduct falls well within the holding of *Parker v. Levy* which limits an officer's First Amendment rights."¹⁵⁹

Arguably, even under the rationale of the Army Court, the restriction on Hartwig's speech would have been unconstitutional if he had been an enlisted person. The COMA probably will be forced to address the First Amendment issues in *Hartwig* in a more comprehensive fashion than was done by the Army court, and expand on in its own recent treatment of First Amendment issues. This decision will perhaps serve as a guidepost for the First Amendment challenges which are sure to follow from prosecutions under the regulation.

When looking at much of the speech that arguably falls within the parameters of hostile environment sexual harassment, the "clear and present danger" test—even with the lowered standard because of the unique requirements of military discipline—does not seem to be met. *Discussions* of women's and men's roles in the military, jokes, and other pure speech (which may or may not be sexual harassment because it is yellow zone conduct) certainly do not raise the clear and present danger to military discipline envisioned by the Supreme Court in *Schenck* and its progeny. The prohibition of this speech does not appear desirable or necessary in light of the traditional and constitutionally permissible vehicles for limiting speech.

E. Vicarious Liability for Sexual Harassment

In addition to outlawing quid pro quo and hostile environment sexual harassment, the regulation contains potentially radical and pervasive provisions for establishing criminal liability on a respondeat superior theory. The regulation allows a supervisor or person in command to be held criminally liable if he or she "condone[s] implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job" of another.¹⁶⁰ Furthermore, paragraph 8b(4) of the regulation prohibits someone in a command or supervisory position from condoning or ignoring sexual harassment of which he or she has knowledge or has reason to have knowledge.

Three broad questions are raised by these provisions. Who is covered by the provisions?; when are they responsible to act against sexual harassment?; and what must they do? The regulation itself, as well as traditional concepts embedded in

¹⁵⁹*Id.* at 685.

¹⁶⁰"SECNAV INSTR. 5300.26B, *supra* note 4, encl. (1).

military criminal law, do not provide much guidance. As to the first question about scope of coverage, just about everyone is covered to varying degrees. Those in command of a unit easily are identified. Those who "supervise," which generally involves most officers, noncommissioned officers, and petty officers, apparently also are covered—at least as far as those areas of duty directly under their supervision. Therefore, the scope of the provision is enormous.

The second question concerning the superior's knowledge of ongoing sexual harassment is more difficult. Initially, the supervisor must know or have reason to know that sexual harassment—presumably in his or her area of cognizance—has occurred or is occurring.¹⁶¹ Because ascertaining what conduct actually is hostile environment sexual harassment is very difficult, establishing actual knowledge also will be difficult. The standard of "has reason to have knowledge" is even murkier.¹⁶²

The closest analogy in military law to this respondeat superior theory is dereliction of duty under UCMJ Article 92(3). This offense requires that the accused have actual knowledge or reason to know of his or her duties.¹⁶³ Actual knowledge of one's duties can be proven by circumstantial evidence; and constructive knowledge can be established by resort to regulations, training manuals, customs of the service, or the testimony of those who held the same or similar positions.¹⁶⁴ At first glance, this same standard for knowledge may appear to be plausible for the regulation, but a qualitative difference exists between knowledge of an objective set of responsibilities (the service member's duties) and knowledge about whether conduct of subordinates constitutes sexual harassment. In reality, the knowledge standard places the supervisor in a position in which he or she constantly must be

¹⁶¹ Because the *fact* of sexual harassment is a predicate for this offense, the difficulties in determining what constitutes sexual harassment (especially in "yellow zone" conduct) are equally in existence for the respondeat superior crime. Accordingly, all of the vagueness and First Amendment issues discussed are equally relevant here.

¹⁶² Examples may serve to illustrate the problem. Does a supervisor who overhears a sexually explicit joke told in the office environment know or have reason to know that sexual harassment has occurred? Arguably, if personnel who find the remark "unwelcome" are present, then the answer is yes. What if no one comes forward and complains? Must he make inquiries with those he feels might be offended? Does the second-line supervisor have a duty to discover this upon report from the first line supervisor? Does the commanding officer have this duty? As another example, consider an anonymous hot-line complaint that alleges sexual harassment in a unit. Does the commanding officer have "reason to have knowledge?" The difficulties in this provision are enormous.

¹⁶³ MANUAL FOR COURTS-MARTIAL, United States, pt. IV para. 16b(3)(b) (1984) [hereinafter MCM].

¹⁶⁴ *Id.* para. 16c(3)(b).

analyzing whether conduct of subordinates may have been unwelcome to other subordinates. If the supervisor decides that the conduct is not sexual harassment and his or her decision is wrong, he or she then has violated the regulation. Such an equivocal burden likely will foster a tendency by supervisors to deem all "yellow zone" conduct sexual harassment just to avoid the possibility that they will be guilty of violating paragraph 8b(4) of the regulation. This, of course, is the same overreaching problem that was discussed in the First Amendment context.¹⁶⁵

Not mentioned in the regulation, but nevertheless a problem, is how to determine the predicate sexual harassment for prosecution of the respondeat superior offense. Presumably, this will require an initial "trial within a trial" to determine whether the perpetrator committed sexual harassment. Independent judicial or administrative determinations of the underlying sexual harassment cannot be used in such a hearing. Relying on these determinations would violate the due process rights of the accused because elements of the respondeat superior crime would be established without confrontation and cross-examination. This obviously will complicate the prosecution of such an offense. Similarly, the regulation neglects to address the effect of independent judicial or administrative determinations that either exonerate or obfuscate the conduct that forms the basis for the respondeat superior offense. The only workable resolution of this issue is that these independent proceedings are of no relevance in the respondeat superior prosecution. This could lead to the rather anomalous situation in which the underlying conduct is deemed in one proceeding not to be sexual harassment and the perpetrator excused, but the supervisor punished because the underlying conduct is deemed sexual harassment in the respondeat superior trial.

The final element of the respondeat superior offense is that the supervisor either "condones" or "ignores" the subordinate's conduct. By placing the admonition in the negative, the regulation does not say explicitly what the supervisor is obligated to do. Is he or she obligated to investigate, counsel, or prosecute the underlying harasser? If he or she investigates and determines that harassment has occurred, but does nothing else, arguably the supervisor would not be guilty under the regulation. In such a scenario he or she has not "ignored" the harassment, but perhaps has "condoned" the harassment. What does a low-level supervisor do to avoid "condoning" or "ignoring?" These vital questions are simply unanswered by the regulation.

¹⁶⁵ See *supra* text accompanying notes 149-150.

Condone and ignore are not concepts generally prosecuted in the criminal law.¹⁶⁶ Such prosecutions obviously would have First Amendment problems, and reek of police-state tactics. In the absence of some affirmative imposition of duties on supervisors, the condone and ignore provisions of the regulation are inherently ambiguous. The imposition of a new category of criminal liability for supervisors for the sexual harassment of subordinates poses enormous problems¹⁶⁷ and, if undertaken, it should be done using the traditional means available to the military—that is, the dereliction of duty offense under UCMJ Article 92.

F. Reprisals and Miscellaneous Provisions of the Regulation

Paragraph 8b(2) of the regulation creates the new offense of taking “reprisals” against a person who reports an alleged incident of sexual harassment. A reprisal is “the wrongful threatening or taking of either unfavorable action against another or withholding favorable action from another solely in response to a report of sexual harassment or violations of this instruction.”¹⁶⁸ This aspect of the regulation seems to be a laudatory provision that fills a gap in the UCMJ for wrongful conduct that is directed against whistleblowers and victims of sexual harassment.¹⁶⁹

¹⁶⁶UCMJ Article 77 makes a party a principal to a crime if he “aids, abets, counsels, commands, or procures” the commission of the underlying crime. But for this theory of criminal liability, the party generally must act in some way to further the crime and share in the criminal purpose of design. MCM, *supra* note 163, pt. IV, para. 1b(2)(b). This same paragraph states that “In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example a guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.” This concept marginally may help to define the concept of “ignoring,” but does nothing to help define what “condones” means.

¹⁶⁷In many cases, the supervisor who condones or ignores the sexual harassment likely will be a perpetrator of the underlying sexual harassment. In such cases, the government probably could not prosecute him for the respondeat superior offense because his own failure to combat the sexual harassment would likely lead to self-incrimination, thereby invoking the “*Heyward* doctrine.” *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986); *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986); *United States v. DuPree*, 24 M.J. 319 (C.M.A. 1987).

¹⁶⁸SECNAV INSTR. 5300.26B, *supra* note 4, encl. (2), para. 8.

¹⁶⁹The only UCMJ provision remotely dealing with reprisals is the Article 134 prohibition against obstructing justice. MCM, *supra* note 163, pt. IV, para. 96. This crime requires that a criminal proceeding have occurred in which the accused attempted to influence, impede, or otherwise obstruct. A criminal proceeding is interpreted broadly, and charges need not even formally be brought. *United States v. Jones*, 20 M.J. 38, 40 (C.M.A. 1985). Still, at least a criminal investigation must have occurred and a corruption of the due processes of justice, not a mere frustration of justice in the abstract sense, must have arisen incident thereto. *United States v. Turner*, 33 M.J. 40, 42 (C.M.A. 1991); *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989). Accordingly, the mere infliction of a reprisal not geared at impeding an investigation or proceeding would not be within the scope of obstructing justice.

While such a provision is beneficial, it contains no scienter requirement as currently drafted. The only aspect of criminality stems from the reprisal definition, which includes the word "wrongful."¹⁷⁰

Because of the nature of sexual harassment allegations, many cases may arise in which a subordinate's continued presence under the supervision of a person, against whom he or she has filed a complaint, affects the mission and is disruptive to good order and discipline in the working environment. Absent a clearer standard for criminality, the mere transfer of the subordinate, pending resolution of the underlying sexual harassment claim, probably would generate a valid reprisal charge even when the underlying allegation of sexual harassment is totally without merit. While such a transfer may not be "wrongful" within the terminology of the regulation, a more specific standard for criminality appears justified, at least for clarity purposes.

Including a scienter element in the reprisal crime would be beneficial. It could narrow the reprisal activity to actions taken with an intent to punish, demean, or embarrass the party providing information concerning a sexual harassment allegation, or done with an intent to impede the fair and accurate gathering of information on the allegation. Such an addition would ensure that innocent, managerial conduct would not fall indiscriminately within the reprisal prohibition.

Another problem the regulation is sure to foster concerns the maximum punishment that can be imposed for violations, especially for hostile environment sexual harassment. A violation of a general order—which the regulation clearly is—carries a maximum punishment of a dishonorable discharge and two years of confinement.¹⁷¹ While this weighty punishment may be one reason why the regulation was enacted, and why a prosecutor might choose to charge the sexually harassing conduct as a violation of the regulation, it actually may not serve to escalate the maximum punishment when the underlying conduct could have been charged as an independent UCMJ offense.

The *Manual for Courts-Martial* provides a specific sentence limitation policy in certain cases involving orders violations under Article 92(1) and (2). That policy is stated in a notation as follows:

[The punishment set forth [Dishonorable Discharge and two years confinement] does not apply in the following cases: if in the absence of the order or

¹⁷⁰ SECNAV INSTR. 5300.26B, *supra* note 4, encl. (2), para. 8.

¹⁷¹ MCM, *supra* note 163, pt. IV, para. 16e(1).

regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed. . . . In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.¹⁷²

Accordingly, if hostile environment sexual harassment could be prosecuted as another offense that has a lesser maximum punishment, the issuance of a punitive order cannot be used to increase the punishment. "The policy behind footnote 5 is to prevent commission of specifically proscribed and relatively minor offenses from being *punished* as more serious violations of Article 92."¹⁷³ Most of the hostile environment sexual harassment conduct that falls within the parameters of the regulation, however, can be prosecuted under established UCMJ provisions. Many of these provisions have maximum punishments that are significantly less than the punishments permitted for violations of UCMJ Article 92(1).¹⁷⁴

¹⁷²*Id.* pt. IV, para. 16e, note. This policy commonly is referred to as the "footnote 5 doctrine because it derived from a footnote attached to the Table of Maximum Punishments in earlier editions of the *Manual for Courts-Martial*.

¹⁷³*United States v. Quarles*, 1 M.J. 231, 232-33 (C.M.A. 1975).

¹⁷⁴For instance, disrespect to a superior commissioned officer under UCMJ Article 89 has a confinement limit of one year, disrespect toward warrant and noncommissioned officers under UCMJ Article 91 ranges from three to nine months confinement, cruelty and maltreatment under UCMJ Article 93 has a one-year confinement limit, provoking speech and gestures under UCMJ Article 117 is six months, simple assault and assault consummated by battery under UCMJ Article 128 are three and six months, respectively, the base punishment for conduct unbecoming under UCMJ Article 133 is one year, and indecent exposure and indecent language under UCMJ Article 134 both have six months confinement caps. For some of these offenses (simple assault, disrespect to noncommissioned officers not in the execution of office, and provoking speech and gestures) no punitive discharge is authorized. MCM, *supra* note 163, app. 12 (Maximum Punishment Chart).

Another related point will limit the use of the regulation for punishment enhancement. In *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989), the court held that sexual harassment type conduct that was maltreatment under UCMJ Article 93 preempted prosecution of the same conduct as a violation of an order under Article 92. In *Curry*, the COMA seemed to confuse the preemption doctrine, which is relevant to prosecutions involving Article 134 that could have been charged as other established UCMJ provisions, with the "footnote 5" doctrine. See MCM *supra* note 163, pt. IV, para. 60c(5) (a); *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992), (discussing the applicability of preemption). The COMA remanded the case and the Navy Court thereafter determined that insufficient evidence existed to sustain the maltreatment charges. *United States v. Curry*, No. 88-0719R (N.M.C.M.R. 31 July 1991). The case was appealed to the COMA again, and the court determined that an affirmed bribery charge did not preempt a standards of conduct orders violation. *United States v. Curry*, 35 M.J. 359 (C.M.A. 1992). Although confusing, the two *Curry* decisions by the COMA lend vitality to the argument that the maximum punishment for Article 93, or other articles of the UCMJ, will serve as the outer limit of punishment when those articles could

One exception to the sentence limitations appears in the footnote 5 doctrine. That exception arises when the "gravamen of the offense" is really something more serious than the specific UCMJ provision, and is instead reflected in the punitive order.¹⁷⁵ Arguably, the fact that the regulation aims at specific *work*-related sexual misconduct is the gravamen of the offense, and thus separately punishable under the regulation.¹⁷⁶ The better view, however, appears to be that the gravamen of most crimes prosecuted under the regulation will be the offensive touchings, statements, or gestures, in and of themselves. A particularly compelling argument is that sexual harassment prosecuted under the maltreatment of a subordinate provision of UCMJ Article 93 has a maximum of only one year's confinement.¹⁷⁷

Because the regulation likely will not form a basis for punishing hostile environment sexual harassment, and more egregious types of sexual harassment (such as quid pro quo offenses and serious assaultive conduct) have greater maximum punishments than UCMJ Article 92(1), little reason exists to use the regulation as a vehicle for prosecuting sexual harassment. The regulation's provision prohibiting the making of a false accusation of sexual harassment¹⁷⁸ is similarly redundant with the more serious offense of making a false official statement in violation of Article 107.¹⁷⁹

V. Prosecutions of Sexual Harassment Under Existing Uniform Code of Military Justice Articles

If the direct approach chosen by the Navy to criminalize sexual harassment is deficient, the only tools currently available to attack the sexual misconduct problem are the existing provisions of the UCMJ. In light of the military's continuing inability to deal timely and effectively with cases such as

have been used to prosecute the sexual harassment offense charged under the regulation. The *Curry* preemption doctrine reasoning was also utilized in *United States v. Asfeld*, 30 M.J. 917, 923 (A.C.M.R. 1990), when the Army Court of Military Review noted in *dicta* that a punitive sexual harassment regulation would be preempted by Article 93.

¹⁷⁵This exception first was applied in *United States v. Buckmiller*, 4 C.M.R. 96 (C.M.A. 1952), and subsequently has been reiterated. *United States v. Loos*, 16 C.M.R. 52 (C.M.A. 1954); *United States v. Timmons*, 13 M.J. 431 (C.M.A. 1982); 37 M.J. 170 (C.M.A. 1993).

¹⁷⁶This argument is strongest when the hostile environment crime will be created by cumulative, ongoing events, none of which, in and of themselves, are violations. This, of course, is when the regulation is most subject to vagueness challenges.

¹⁷⁷MCM, *supra* note 163, pt. IV, para. 17(e).

¹⁷⁸SECNAV INSTR. 5300.26B, *supra* note 4, para 8b(3).

¹⁷⁹MCM, *supra* note 163, pt. IV, para. 31.

Tailhook, one naturally must inquire if the substance of existing law is adequate to deal with the "sexual harassment" problem, as that phrase is given its broadest meaning. The following part analyzes whether the UCMJ is a sufficient vehicle to use in an effort at eradicating sexual harassment in the military.

Conduct that, in the current lexicon, is sometimes considered sexual harassment ranges in severity from offensive verbal remarks (mild hostile environment), through use of position to obtain sexual favors (*quid pro quo*), to serious violent sexual assault crimes, including rape. Although few prosecutions to date have arisen for conduct that might be seen as hostile environment sexual harassment, the UCMJ provides a comprehensive criminal system that can be used as a framework for enforcing sexual harassment prohibitions.

A. *Maltreatment: The Uniform Code of Military Justice Sexual Harassment Provision*

The UCMJ article that most directly addresses sexual harassment is Article 93.¹⁸⁰ This article was an original UCMJ provision, and had its origins in Article 8 of the Articles for the Government of the Navy.¹⁸¹ The basic purpose in enacting the article was to prevent officers from maltreating enlisted personnel under their charge.¹⁸²

Surprisingly, over the years, very little litigation has arisen over what acts constitute maltreatment. Relying on a dictionary definition of maltreatment, the Navy Board of Review in *United States v. Finch* stated the essential elements of the crime as follows: "It is therefore obvious that the offense of maltreatment must be real, although not necessarily physical, cruel or inhuman, and the act or acts alleged must be toward a person subject to the orders of the accused."¹⁸³ The Board, however, also recognized the inherent difficulty in attempting to define maltreatment—a difficulty quite analogous to the modern problem of defining sexual harassment.

[I]t is rather an impossibility for us to lay down a rigid rule as to what constitutes maltreatment or to say

¹⁸⁰This article states, "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct."

¹⁸¹*United States v. Dickey*, 20 C.M.R. 486, 488 (N.B.R. 1956), *United States v. Finch*, 22 C.M.R. 698, 701 (N.B.R. 1956). No similar provision existed in the Articles of War. *Id.* A review of the legislative history contained in the INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950 (1985) shows that absolutely no discussion concerning this article arose when the Code was enacted.

¹⁸²*Dickey*, 20 C.M.R. at 488.

¹⁸³*Finch*, 22 C.M.R. at 701.

that certain acts must fall within this category as each case must normally rest upon its own bottom and the offense of maltreatment would ordinarily be a question of fact to be determined by the trial forum.¹⁸⁴

The *Manual For Courts-Martial* states "Assault, improper punishment and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature."¹⁸⁵ Accordingly, Article 93 is clearly available as a means of prosecuting sexual harassment that is manifested as assaults, quid pro quo, and certain types of hostile environment conduct. Note that the *Manual for Courts-Martial* sexual harassment definition is not exclusive because it uses the word "includes" prior to its listing of conduct that constitutes sexual harassment. Therefore, the list could be expanded by case law. The most significant limitation on the use of Article 93 is that the person to whom the maltreatment is directed must be subject to the orders of the accused. That the maltreatment victim be subject to the UCMJ is not necessary. Instead, any person over whom the accused possesses authority falls within the ambit of the prohibition.¹⁸⁶

While the *Manual for Courts-Martial* sexual harassment provision has been on the books since 1984,¹⁸⁷ the COMA has had few opportunities to explore the parameters of the offense. In *United States v. Curry*,¹⁸⁸ the COMA determined that an Article 93 specification of maltreatment by a male supervisor of a barracks for attempting to obtain a "head to toe body massage" from a female sailor in exchange for his providing a job benefit preempted a violation of a general order based on the same conduct. Although the decision has no discussion or legal analysis of the maltreatment sexual harassment, it does make clear that UCMJ Article 93 can be a basis for prosecuting the quid pro quo type of sexual harassment.

The only reported decision to discuss Article 93 in any depth as a means for prosecuting sexual harassment is *United States v.*

¹⁸⁴ *Id.*

¹⁸⁵ MCM, *supra* note 163, pt. IV, para. 17c(2).

¹⁸⁶ *Dickey*, 20 C.M.R. at 488; MCM, *supra* note 163, pt. IV, para. 17c(1).

¹⁸⁷ MCM, *supra* note 163, app. 21, para. 17.

¹⁸⁸ 28 M.J. 419 (C.M.A. 1989); *see supra* note 174 (discussing *Curry* with respect to whether the preemption doctrine would affect the Navy regulation). The paucity of case law regarding this crime undoubtedly reflects the social issues surrounding sexual harassment. While military courts may not have dealt extensively with this issue in a direct fashion in the past, they obviously will be required to address the issue in the future.

Hanson.¹⁸⁹ Significantly, this was a hostile environment prosecution in which the accused was an Air Force officer supervising various male and female enlisted personnel. Over a period of years, Captain Hanson made numerous sexually explicit remarks and gestures in his work dealings with his subordinates.¹⁹⁰ The accused claimed to have done these things as jokes and techniques to establish good relations with his subordinates, but the subordinates testified that his words and actions were “disruptive, embarrassing and vulgar.”¹⁹¹

Rejecting the accused’s “joke defense,” the court noted that maltreatment is a general intent crime and “occurs when the treatment, viewed objectively, results in physical or mental pain or suffering and is abusive or otherwise unwarranted, unjustified and unnecessary for any lawful purpose.”¹⁹² The court went on to explain how hostile environment type conduct can rise to criminality under Article 93.

Assuming *arguendo* that the appellant was merely joking and only intended to set up “informal and effective” office relationships, how can his conduct rise to the level of actionable offenses? Appropriate conduct can only be discerned by examination of the relevant surrounding circumstances. For example, what is condoned in a professional athletes’ locker room may well be highly offensive in a house of worship. A certain amount of banter and even profanity in a military office is normally acceptable and, even when done in “poor taste,” will only rarely rise to the level of criminal misconduct. But just as Justice Stewart knew obscenity when he saw it [*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)], we find it clear from the totality of the appellant’s actions that his conduct was so abusive and unwarranted as to support his conviction for maltreatment.

By our ruling today, we do not hold that any single offensive comment to or action against a military subordinate will necessarily constitute a criminal offense. We do find, however, that the appellant’s conduct amounts to maltreatment as envisioned by Article 93.

¹⁸⁹30 M.J. 1198 (A.F.C.M.R. 1990), *aff’d*, 32 M.J. 309 (C.M.A. 1991) (summary disposition).

¹⁹⁰For instance, in the presence of male and female subordinates he would make remarks such as “I have a big one for you,” “blow me,” “suck my dick,” and “get under my desk,” while frequently clutching at his groin area. *Hanson*, 30 M.J. at 1200.

¹⁹¹*Id.*

¹⁹²*Id.* at 1201.

Over a two and a half year period, he engaged in a course of conduct that evinced callous disregard for the sensitivities and self-esteem of his military subordinates. Despite the contentions of the captain-appellant that he was merely "joking," the noncommissioned officer victims of his abusive conduct were entitled to protection from such offensive conduct.¹⁹³

Consequently, hostile environment sexual harassment must be analyzed under an objective standard, looking at the totality of the circumstances. The intent of the perpetrator is not controlling, and the reactions of the "victims" are of critical importance. Furthermore, the Court indicated that normally one instance of offensive behavior will not be sufficient to commit the crime. Instead, like the thirty-month course of conduct by Hanson, the conduct normally will have to be pervasive and repeated, similar to the standard developed by the Supreme Court for *Vinson*.¹⁹⁴

In *United States v. Rutko*¹⁹⁵ an Army unit first sergeant abused his position to lure junior soldiers into positions where he could engage in homosexual relations with them. The Army Court of Military Review held that his use of his "superior military position to induce soldiers to commit unwanted sexual acts is maltreatment."¹⁹⁶

¹⁹³*Id.*

¹⁹⁴See *supra* text accompanying note 15. Even though the *Manual for Courts-Martial* discussion of maltreatment contains some of the sexual harassment concepts that exist in employment discrimination law, the thrust of the legal analysis in *Hanson* uses traditional military criminal law concepts that can be analogized to employment discrimination sexual harassment. The term "sexual harassment" is not used in the *Hanson* decision. Actually, Hanson apparently was convicted of conduct unbecoming an officer in violation of UCMJ Article 133, rather than maltreatment in violation of Article 93. *Hanson*, 30 M.J. at 1202. Such an approach to prosecuting sexual harassment under the various UCMJ provisions will avoid many of the ambiguity problems that burden Title VII law and its adaptation into the Navy regulation.

Contrast the actionable maltreatment in *Hanson* with the much older case of *United States v. Wheatley*, 28 C.M.R. 461 (A.B.R.), *aff'd*, 28 C.M.R. 103 (C.M.A. 1959), in which a maltreatment conviction for a company commander was reversed. In the presence of the accused (the commander), a trainee being "oriented by a master sergeant was to "sound off" certain obscenities whenever the sergeant gave him a particular cue. The Government argued that the sergeant's activity constituted mental maltreatment, and the commander's failure to intervene and his acquiescence in the conduct made him an aider and abettor. The Army Board of Review, focusing on the fact that the "Victim" who was most affected by the activity considered it a "joke," decided not to punish the commander "because he ignores and fails to censor the horseplay and language of his enlisted subordinates whenever it exceeds the bounds of good taste." *Wheatley*, 28 C.M.R. at 463-64. While this case may indicate only that sexual harassment in today's environment is much more cruel or offensive, it does highlight that the "victim's" perceptions are a key factor, and that the question of a supervisor's liability for the known misconduct of a subordinate is a difficult issue.

¹⁹⁵36 M.J. 798 (A.C.M.R. 1993).

¹⁹⁶*Id.* at 801.

The only other case in which Article 93 has been used as a vehicle for prosecuting sexual harassment is *United States v. Cantu*.¹⁹⁷ On appeal, the case involved multiplicity issues stemming from various acts of sexual harassment by a male sergeant who abused various female Marines while he was a school instructor. He was convicted of violating a local order, fraternization, and maltreatment for "making comments of a sexual nature." The maltreatment conviction was affirmed, but unfortunately, the decision did not discuss the nature or extent of the hostile environment offense.

The perceived problems with using Article 93 are its expressed limit of protecting only those who are directly subject to the orders of the accused, and the lack of a clear standard as to what hostile environment activities constitute maltreatment. This latter problem for the maltreatment article is dwarfed by the same problem for the even more expansive concept of the hostile environment contained in the regulation.¹⁹⁸ Possibly the latter issue can be resolved with more cases fleshing out the standard for Article 93. The Tailhook facts demonstrate the former limitation of the article because none of the Tailhook victims were likely subject to the orders of the gauntlet operators. Furthermore, the survey sexual harassment research has shown that the vast majority of harassment occurs among co-workers.¹⁹⁹ Although a limitation, it may not be a major problem because numerous articles in the UCMJ deal with sexually assaultive conduct and other milder forms of harassment. The only real legal problem with Article 93 is that the maximum punishment for this article, as presently delineated by the President, is one year of confinement.²⁰⁰ This limitation easily could be changed by presidential action.²⁰¹ The other deficiency with the article is that it simply has not been used. This may reflect the sociological problems the military has had in dealing with sexual harassment, but it is not indicative of a technical problem with the law.²⁰²

¹⁹⁷22 M.J. 819, 823 (N.M.C.M.R. 1986).

¹⁹⁸See *supra* section IVA.

¹⁹⁹See *supra* text accompanying notes 46-59.

²⁰⁰MCM, *supra* note 163, pt. IV, para. 17e. The maximum punishment does include a dishonorable discharge.

²⁰¹UCMJ art. 56.

²⁰²A direct comparison of the regulation hostile environment with the provision in UCMJ Article 93 is illuminating. Sexual harassment under UCMJ, as interpreted by *Hanson*, 30 M.J. at 1201, has a standard that is clearly objective with the victim's reaction merely an important factor in determining whether "the deliberate or repeated offensive commands or gestures of a sexual nature" constitute the sexual harassment version of maltreatment. MCM, *supra* note 163 pt. IV, para. 17c(2). It does not include the "unwelcome" concept of the regulation, which throws confusion into whether the standard is objective or subjective. Also,

B. Serious Violent Sex Crimes Against Women

Sexual harassment that reaches the most severe degree encompasses the criminal activity of rape and sexual assault. The UCMJ, through Articles 120 (rape and carnal knowledge), 125 (sodomy), 128 (assault), and 134 (indecent assault and indecent acts), provides an exhaustive structure to prosecute conduct that can be seen as the extreme manifestations of sexual harassment. To characterize these crimes as sexual harassment actually may minimize the severity of the misconduct. Behavior that rises to the level of these offenses is criminal, in and of itself, fully apart from the fact that it may have grown out of a duty or work relationship—that is the defining characteristic of Title VII sexual harassment. Still, the reported cases are replete with sex offenses that arose in a context that fit into the standard definitions of sexual harassment. All rapes by supervisory personnel are obviously “unwelcome” sexual advances that have as their effect an unreasonable interference with a subordinate’s work performance or create a hostile environment.

In *United States v. Clark*,²⁰³ the accused, a male sergeant first class, ordered a female private basic trainee, whom he was supervising, into a secluded, pitch-black room. He instructed the private to take off her trousers and bend over, whereupon he engaged in sexual intercourse with her. Later he told her not to tell anyone what he had done or they would both get in trouble, and that they would have sex again the next time she was assigned to work for him.²⁰⁴ The *Clark* appeal involved whether or not the passive acquiescence of the victim to the conduct of the military superior was sufficient to invoke the constructive force doctrine for rape. Although a split decision (two concurring opinions and a dissent), the case lends great support for an assertion that the use of superior rank, coupled with a physically coercive environment, may be sufficient to prove rape even when the victim used little or no physical force or manifestations of lack of consent. Potentially, the most far-reaching language of the lead opinion by Judge Crawford is the following:

We join wholeheartedly in the holding of the court below “that the appellant cannot create by his own actions an environment of isolation and fear and then seek excusal from the crime of rape by claiming the

as interpreted in *Hanson*, 30 M.J. at 1201, the severe and pervasive requirement exists for maltreatment sexual harassment—a requirement that apparently has been abandoned in the regulation. The UCMJ provisions that address sexual harassment are far clearer and fairer than the provisions of the regulation.

²⁰³35 M.J. 432 (C.M.A. 1992).

²⁰⁴*Id.* at 433-34.

absence of force," 32 M.J. at 610, especially where, as here, passive acquiescence is prompted by the unique situation of dominance and control presented by appellant's superior rank and position.²⁰⁵

In a similar case, *United States v. Bradley*,²⁰⁶ a drill sergeant of a recruit used his superior rank and position to coerce sexual intercourse from the recruit's youthful wife. The accused threatened the wife that he would impose Article 15 UCMJ punishment on the recruit unless the wife engaged in sexual intercourse with him. Even though the offense occurred off base and against a civilian, it was still a form of quid pro quo sexual harassment.²⁰⁷

While the Clark and Bradley decisions press the outer limit for finding the force and lack of consent necessary for rape when a superior uses his position of authority to obtain sex, numerous other cases report of rape and sexual assault that can be seen as being sexual harassment.²⁰⁸

The crime of rape under the UCMJ is a capital offense.²⁰⁹ The maximum punishments for other less serious sexual assault crimes, such as simple assault, assault consummated by battery, assault with intent to commit rape, and indecent assault, all impose significant sanctions.²¹⁰ Clearly, prosecutors would prefer to use these punitive provisions to prosecute this type of sexual harassment even if the regulation was available.

²⁰⁵*Id.* at 436.

²⁰⁶28 M.J. 197 (C.M.A. 1989).

²⁰⁷The same fact pattern occurred in *United States v. Hicks*, 24 M.J. 3 (C.M.A.), *cert. denied*, 484 U.S. 827 (1987). The accused, a male Marine sergeant, discovered a 20-year-old girlfriend of a private (who worked under the sergeant's supervision) unlawfully in the barracks. The accused told the private that he should have the girl go to the accused's room while the private was at work so that the private's misconduct would not be discovered. Once in the accused's room, he coerced her to have intercourse with him to prevent the private from getting in trouble.

²⁰⁸*United States v. Mathai*, 34 M.J. 33 (C.M.A. 1992), (sergeant orders drunk private to "follow him" and rapes her after she passes out); *United States v. Frye*, 33 M.J. 1075 (A.C.M.R. 1992) (male sergeant convicted of indecent assault after posing as Criminal Investigation Command agent and obtaining sexual favors from a private in exchange for not arresting her for drug offense); *United States v. Jackson*, 25 M.J. 711 (A.C.M.R. 1987) (platoon sergeant in charge of quarters indecently assaulted subordinate female private in barracks).

²⁰⁹MCM, *supra* note 163, pt. IV, para. 45e. Serious doubt has arisen over the constitutionality of capital punishment for rape of an adult. *See Coker v. Georgia*, 433 U.S. 584 (1977). Even assuming the death penalty is unconstitutional for rape, confinement up to life imprisonment provides a strong avenue of retribution.

²¹⁰*See* UCMJ art. 128 (simple assault—three months' confinement; *id.* (assault consummated by battery—six months' confinement); MCM, *supra* note 163, pt. IV, para. 54e; UCMJ art. 134 (indecent assault—five years' confinement); MCM, *supra* note 163, pt. IV, para. 63e (assault with attempt to commit rape—20 years' confinement); *id.* para. 64e.

C. Abusing Positions of Authority to Commit Sexual Harassment

Violent sex offenses are most indicative of sexual harassment when they occur in the work or duty environment, or when positions of authority are abused. The UCMJ has three articles available for prosecuting sexual harassment offenses when the harassment involves abuse of authority. Those are fraternization under Article 134, conduct unbecoming an officer and a gentleman under Article 133, and violating general orders involving standards of conduct under Article 92.

Fraternization is the unlawful association between service members of different ranks in violation of a custom or tradition of the military service.²¹¹ While the scope of conduct that is prohibited varies between the services, and the validity of the prohibitions is subject to great debate,²¹² throughout the services, at a minimum, sexual relations between service members having a supervisory or chain-of-command relationship is prohibited.²¹³ Accordingly, even in situations in which legal consent is present (and perhaps even "welcome" sexual advances), much sexual activity that poisons the work environment can be prosecuted as fraternization.²¹⁴ The fraternization prohibition often will be even broader than Title VII prohibitions.

Frequently, sexual harassment stems from males in positions of authority abusing that power. In the military, those males often will be officers. As such, they must abide by the general prohibition against conduct unbecoming an officer and gentleman contained in Article 133. This statute has a vast sweep and it long has been used to prosecute conduct that today is seen as sexual harassment. As an example, in *United States v. Parini*,²¹⁵ an officer was

²¹¹MCM, *supra* note 163, pt. IV, para. 83.

²¹²See generally David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 MIL. L. REV. 37 (1992).

²¹³See, e.g., *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990); *United States v. Appel*, 31 M.J. 314 (C.M.A. 1990) (sex between commanding officer and subordinate enlisted is violation of Air Force custom); *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), *aff'd*, 24 M.J. 347 (C.M.A. 1987) (summary disposition); *United States v. Moultaq*, 21 M.J. 822, 831-34 (N.M.C.M.R. 1985), *aff'd*, 24 M.J. 316 (C.M.A. 1987). Fraternization also can serve as a basis for conviction of conduct unbecoming an officer and gentleman under UCMJ Article 133. *United States v. Perrillo*, 34 M.J. 112, 120 (C.M.A. 1992); *United States v. Van Steenwyk*, 21 M.J. 795, 805 (N.M.C.M.R. 1985).

²¹⁴Fraternization between senior enlisted and their subordinates also is subject to prosecution if the relationship is service discrediting or prejudicial to discipline. *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986); *United States v. March*, 32 M.J. 740 (A.F.C.M.R. 1991); *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989). Likewise, dating and sexual relations between senior officers with junior officers under their command or supervision is subject to the fraternization prohibition. *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986).

²¹⁵12 M.J. 679 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 207 (C.M.A. 1982).

prosecuted for two specifications of "conduct unbecoming" for attempting to obtain sexual favors from female subordinates in return for his writing favorable performance evaluations. The court had no trouble finding this quid pro quo form of sexual harassment to be violative of Article 133. More recently, in *United States v. Kroop*,²¹⁶ a lieutenant colonel was convicted of conduct unbecoming an officer for making sexual advances and verbal comments of a sexual and intimate nature to a married officer under his command, thereby creating "an intimidating, hostile, and offensive environment." The Air Force Court of Military Review rejected the accused's claim that the specification failed to state an offense, even though it reversed his conviction because the accused refused during the providence inquiry to admit that his conduct created a hostile environment for the subordinate.²¹⁷ Consequently, Article 133 is an excellent substantive device for enforcing criminal sanctions for conduct in the nature of hostile environment sexual harassment. The statute provides a flexible means of prosecuting sexual harassment and it is anchored in familiar and approved military law doctrine.

Service members also are obligated to conform their conduct to certain standards of conduct for government employees that prohibit using one's official position for personal gain.²¹⁸ These standards prohibit using the powers of office to obtain sexual favors, which essentially is the quid pro quo aspect of sexual harassment. Additionally, most training commands issue punitive regulations that forbid social fraternization, including sexual relations, between the training staff and the trainees. These regulations protect vulnerable subordinates from coercion by those in positions of authority.²¹⁹ The intimate relationship between officer conduct, fraternization, sexual harassment, and maltreatment of subordinates therefore is covered in a UCMJ comprehensive scheme to protect unit morale, cohesion, and discipline.²²⁰

²¹⁶ 34 M.J. 628 (A.F.C.M.R. 1992).

²¹⁷ *Id.* at 635.

²¹⁸ Until recently, each service had a punitive standards of conduct regulation. See DEPT OF ARMY, REG. 600-50, STANDARDS OF CONDUCT FOR THE DEPARTMENT OF ARMY PERSONNEL (28 Jan. 1988); DEP'T. OF AIR FORCE, AIR FORCE REG. 30-30, STANDARDS OF CONDUCT (26 May 1989); DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5370.25 (15 Mar. 1989). These regulations, however, are now obsolete because, as of February 3, 1993, the entire federal executive branch, including the armed forces, is being regulated by a single regulation. Standards of Ethical Conduct for Employees of the Executive Branch. See 5 C.F.R. pt. 2635 (1992). This regulation has the same prohibition against using one's official position for personal advantage as did the service regulations. *Id.* § 2635.702. The DOD plans to supplement these rules with a punitive regulation.

²¹⁹ See, e.g., *United States v. Sartin*, 24 M.J. 873 (A.C.M.R. 1987), *pet. denied*, 26 M.J. 60 (C.M.A. 1988); *United States v. Moorer*, 15 M.J. 520 (A.C.M.R. 1983), *aff'd in pertinent part*, 16 M.J. 451 (C.M.A. 1983) (summary disposition).

²²⁰ *United States v. Lowery*, 21 M.J. 998, 1001 n.3 (A.C.M.R. 1986), *aff'd*, 24 M.J. 347 (C.M.A. 1987) (summary disposition).

D. Miscellaneous Provisions

Article 127 (extortion) is the UCMJ provision against threat type sexual harassment. It provides that any threats communicated to another to obtain something of value, an acquittance, or an advantage is a crime. In *United States v. Hicks*,²²¹ the COMA specifically rejected a contention that the thing of value or advantage was limited to a pecuniary or material gain. Threats geared to obtaining a sexual favor—or even items that are not overtly sexual, but satisfy the subjective sexual desires of the perpetrator—can form the basis for an extortion sexual harassment prosecution. Obtaining some sexual “thing of value” also could serve as a basis for a bribery or graft conviction under Article 134 if the harasser occupies an official position and uses it for his or her private prurient benefits.²²²

The UCMJ also provides a framework for prosecuting less pernicious, but undoubtedly more common, forms of hostile environment sexual harassment. Articles 89 and 91 prohibit subordinates from being disrespectful in behavior or language to their superiors.²²³ In *United States v. Dornick*,²²⁴ an enlisted male was convicted of disrespect when he greeted a female officer with the words “Hi sweetheart.” The court’s finding of unlawful “sexist familiarity”²²⁵ provides a basis for prohibiting a broad spectrum of offensive workplace comments and behavior.

The vast majority of sexual harassment involves offensive remarks between coworkers.²²⁶ In an area that civilian society grants special protection under the First Amendment, Article 117 prohibits the use of “provoking” or “reproachful” words or gestures. These two terms are defined as those “words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances.”²²⁷ In the military context, the amount of provocation that can lead to a breach of

²²¹ 24 M.J. 3 (C.M.A. 1987), *cert. denied*, 484 U.S. 827 (1987).

²²² “See MCM, *supra* note 163, pt. IV, para. 66; *Moorer*, 15 M.J. at 521.

²²³ MCM, *supra* note 163, pt. IV, paras. 13 and 15. Both of these provisions have technical requirements that may limit their viabilities as a means of prosecuting offensive gestures and remarks in the workplace environment. Most fundamentally, they do not apply unless the words or conduct are directed toward a superior; and with respect to warrant, noncommissioned, and petty officers, the victims must be in execution of their duties when the offending behavior occurs. *Id.* pt. IV, para. 15b(3)(e).

²²⁴ 16 M.J. 642 (A.F.C.M.R. 1983).

²²⁵ *Id.* at 643.

²²⁶ See *supra* text accompanying notes 46-59.

²²⁷ MCM, *supra* note 163, pt. IV, para. 42c(1). The First Amendment restriction for this offense is clearly grounded in the “clear and present danger” and “fighting words” doctrines.

the peace is rather low.²²⁸ The words used need not be a challenge to do violence, but instead merely must have a "tendency to lead to quarrels, fights or other disturbances."²²⁹ With such a low standard, many workplace remarks and gestures would seem to fall within the ambit of this statute.

An even broader offense is the Article 134 prohibition against the use of "indecent language."²³⁰ The expansive applicability of this provision can be seen in the analysis of several recent child abuse cases. In *United States v. French*,²³¹ the COMA was asked to decide what constitutes indecent language under the UCMJ. The accused had sexually abused his young stepdaughter and he was charged, inter alia, with an indecent language offense for asking her if he could climb into bed with her. The court acknowledged that words can be either per se indecent or indecent because of the circumstances in which they are uttered. It established the following as the test for whether the words spoken are criminal:

In assessing whether indecent language is framed adequately in a specification, the courts below have recognized a number of factors, including: "fluctuating community standards . . . , the personal relationship existing between a given speaker and his auditor, . . . and the probable effect of the communication" as deduced from the four corners of the specification. A test which has been used is "whether the particular language is calculated to corrupt the morals or excite libidinous thoughts." We adopt this test as an appropriate determination for indecent language.²³²

Additionally, for this crime nothing requires that the words be spoken with an intent to gratify the speaker's sexual desire. Instead, they merely must communicate an indecent message.²³³

Using this standard, calling a female child a "bitch" and a "cunt" is indecent,²³⁴ but calling a female Marine a "swine" is

²²⁸In *United States v. Linyear*, 3 M.J. 1027 (N.C.M.R. 1977), *pet. denied*, 5 M.J. 269 (C.M.A. 1978), a male sailor called a female sailor a "swine" and walked away from her. The court held that such language was sufficient to state an offense under UCMJ Article 117.

²²⁹*United States v. Davis*, 34 M.J. 849, 851 (A.C.M.R. 1992).

²³⁰MCM, *supra* note 163, pt. IV, para. 89c, explains that "indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature or its tendency to incite lustful thoughts."

²³¹31 M.J. 57 (C.M.A. 1990).

²³²*Id.* at 60 (internal citations omitted).

²³³*Id.*

²³⁴*United States v. Dudding*, 34 M.J. 975 (A.C.M.R. 1992).

not.²³⁵ Similarly, asking a woman to meet for a date at a hotel was not indecent, but offering fifty dollars for a date at a hotel was indecent.²³⁶ Accordingly, much of what is often deemed verbal sexual harassment clearly can be analyzed appropriately under the developed constitutional and military law for indecent language.²³⁷

Analogous to the indecent language offense is the "indecent acts" offense, also under Article 134.²³⁸ Consensual, but public, sexual conduct, such as intercourse and fellatio, are criminalized under this provision.²³⁹ Taking indecent photographs,²⁴⁰ having an enlisted person pose in the nude,²⁴¹ dancing naked with children,²⁴² and consensual "heavy petting" between a married officer and a sixteen-year-old military dependent²⁴³ are examples of acts that have been determined to be indecent.

Certain types of conduct that may be viewed as sexual harassment also are regulated by some miscellaneous Article 134 offenses. At the 1991 Tailhook convention, numerous incidents of indecent exposure occurred. This type of conduct is clearly punishable under Article 134.²⁴⁴

The sexual harassment conduct that can be perpetrated is limited only by the potential perversity of the human mind, often

²³⁵Such a term does not invite libidinous thoughts. *United States v. Linyear*, 3 M.J. 1027, 1030 (N.C.M.R. 1977), *pet. denied*, 5 M.J. 269 (C.M.A. 1978).

²³⁶*United States v. Wainwright*, 42 C.M.R. 997, 999 (A.F.C.M.R.), *aff'd on other grounds*, 43 C.M.R. 23 (C.M.A. 1970). In *United States v. Hullett*, 36 M.J. 938, 940 (A.C.M.R. 1993), a male supervisor's comments to a female subordinate that if given a chance he could "make [her] eyes roll in the back of [her] head and [her] toes curl under" constituted indecent language.

²³⁷Indecent language is equivalent to "obscene" language. MCM, *supra* note 163, app. 21, para. 102. Judge Cox in *French* relied upon the Supreme Court's reasoning in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), and *Roth v. United States*, 354 U.S. 476 (1957), to help determine what is obscene in a constantly changing society. *French*, 31 M.J. at 59.

²³⁸MCM, *supra* note 163, pt. IV, para. 90. The wrongful act must be committed with another and it must be indecent, which is defined as those forms "of immorality relating to sexual impurity which [are] not only grossly vulgar, obscene, and repugnant to common propriety, but tend to excite lust and deprave the morals with respect to sexual relations." *Id.* para. 90c.

²³⁹*United States v. Blake*, 33 M.J. 923 (A.C.M.R. 1991); *United States v. Linnear*, 16 M.J. 628 (A.F.C.M.R. 1983), *pet. denied*, 17 M.J. 277 (C.M.A. 1983). Fellatio also could be charged as a violation of UCMJ Article 125. *See United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992).

²⁴⁰*United States v. Whitcomb*, 34 M.J. 984 (A.C.M.R. 1992).

²⁴¹*United States v. Holland*, 31 C.M.R. 30 (C.M.A. 1961).

²⁴²*United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987).

²⁴³*United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R. 1986), *vacated on other grounds*, 23 M.J. 400 (C.M.A. 1987).

²⁴⁴*See* MCM, *supra* note 163, pt. IV, para. 88 (indecent exposure); *United States v. Choate*, 32 M.J. 423 (C.M.A. 1991).

colored by the effects of alcohol. Fortunately, military law provides a flexible mechanism in Article 134 that proscribes all conduct (assuming sufficient due process notice) that is service discrediting or prejudicial to good order and discipline. This broad prohibition has been described as follows:

Article 134 has two categories of proscribed conduct:

1—that which is “illegal under the common law or statutes”; and

2—“that which-however eccentric or unusual” is not unlawful in a civilian community but becomes illegal “solely because, in the military context, its effect is to prejudice good order or to discredit the service.”²⁴⁵

Under the circumstances in *United States v. Guerrero*,²⁴⁶ the mere public display of cross-dressing by a service member was service discrediting. As this case demonstrates, a great deal of conduct that would not be criminal in the civilian world may be deemed criminal in the military and prosecuted as a violation of Article 134.

Finally, the UCMJ provides one other avenue for proscribing conduct that some may view as sexual harassment. Service members can be given lawful orders to refrain from certain conduct, violations of which are punishable under Articles 90 thru 92. Accordingly, an officer or superior can order a service member to refrain from making remarks, gestures, or conduct that someone finds offensive if such order reasonably relates to the recipient’s military duties. A service member could be ordered not to ask another out on dates after previously being refused, not to use certain nicknames or language that an individual finds offensive, or not to display certain materials (such as magazines and calendars) in the workplace. This is a flexible means of giving notice to a service member of what conduct constitutes sexual harassment, protecting the sensibilities of individuals that, at first blush, might be overly sensitive, and clearly identifying that a violation has occurred.

The UCMJ is a comprehensive code that has constitutionally approved provisions that cover the full array of criminal sexual harassment conduct in the military. Its provisions clearly prohibit both quid pro quo and hostile environment sexual harassment.

²⁴⁵*United States v. Guerrero*, 33 M.J. 295, 297 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1173 (1992) (quoting *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988)).

²⁴⁶33 M.J. 295, 298 (C.M.A. 1991).

The reach of the criminal sanctions and the possible severity of the punishments actually go far beyond the deterrence of Title VII's civil liability. In light of the serious consequences of prosecutions for offenses that are in the nature of sexual harassment, the elements of these established offenses must be satisfied before an offender be labeled and punished as a criminal.²⁴⁷

VI. The Proposal to Adopt a Specific Sexual Harassment Statutory Prohibition

An additional approach to combatting the sexual misconduct problem is the passage of an amendment to the UCMJ to criminalize sexual harassment directly. The obvious practical difficulty is that this approach requires both congressional and presidential action. Nevertheless, this part will explore one version of this approach that is currently being considered as a solution to the military's sexual harassment problem.

In the Secretary of the Navy's June 12, 1992 memorandum, which called for the drafting of a specific UCMJ article outlawing sexual harassment,²⁴⁸ he noted several benefits from such an approach. First, he contended that the lack of a specific comprehensive provision to prosecute sexual harassment with tailored appropriate maximum punishments creates both confusion over the correct means for prosecuting these crimes and disparate treatment for offenders. Second, he equated the problem of sexual harassment to the earlier drug abuse problem, which he implied was not addressed seriously until the enactment of Article

²⁴⁷ Article 92(3) makes criminal not only intentional, but also negligent dereliction of duty. In light of the "zero tolerance" policy on sexual harassment that has been publicized extensively and implemented throughout the military via regulation, commanders and supervisors who are aware of, or should be aware of, sexual harassment in their units likely are subject to sanctions under a dereliction of duty theory. The main requirement for liability under this theory is knowledge of a duty. MCM, *supra* note 163, pt. IV, para. 16b(3)(b). While the exact scope of the duty that superiors must obey presently is unclear, prosecutions using dereliction of duty as a theory for the respondeat superior crime will at least be aligned with a traditional concept in military criminal law. The criminal standard will be much more certain than that of the regulation, which is keyed to the superior's knowledge of a subordinate's harassment, rather than an affirmative duty. The ambiguity about what conduct constitutes hostile environment sexual harassment is lessened. Under Article 92(3) little difficulty will arise in finding a superior responsible when the underlying sexual harassment is severe and pervasive. At the same time, using the statute should protect against unwarranted prosecutions when the acts of the subordinate are more marginal. This is a fairer and more workable way to deal with the vicarious liability issue than using the regulation.

²⁴⁸ Memorandum from H. Lawrence Garrett III, Secretary of the Navy to the Judge Advocate General of the Navy (June 12, 1992) (on file with author).

112a. Finally, he stated that a specific statute would facilitate a better collection of data on the number of sexual harassment offenses, thereby providing a gauge for assessing the progress made in rectifying the sexual harassment problem.²⁴⁹ Each of the Secretary's points is undoubtedly valid to varying degrees, and they collectively present a strong case for a substantive change to the law to fight sexual harassment effectively.

While the Navy has borne the brunt of the adverse publicity on sexual harassment, that the problem exists in all of the services is beyond cavil. One of the primary purposes in enactment of the **UCMJ** was uniformity of the law for all service members.²⁵⁰ With ever increasing "jointness," this rationale for a unified application of the law is even more compelling.²⁵¹ Additionally, many of the constitutional problems concerning vagueness and the First Amendment are ameliorated when Congress, as opposed to a military department head (or even some subordinate officer with authority to issue general orders), acts. The following section briefly will examine the legislation drafted in response to Secretary Garrett's proposal especially in the context of the problems perceived to be created by the regulation.

Initially, the proposed legislation²⁵² is more comprehensive and legalistic than the regulation. Even a cursory examination reveals that the legislation is a legal document geared at structural and technical legal issues, whereas the regulation is a policy and sociological document.²⁵³ A basic problem with the regulation is that its expansive punitive reach is not complemented with the technical and coherent legal framework to implement the overall regulatory prohibitions adequately. The statute's technical preci-

²⁴⁹*Id.*

²⁵⁰See H.R. REP. No. 491, 81st Cong., 1st Sess. 39 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE, 1950 (1985).

²⁵¹Of course, the continued prosecution of the underlying conduct under standard **UCMJ** provisions, without resort to individual service-specific punitive regulations, provides the same uniformity.

²⁵²The proposal is designated as **UCMJ** Article 93a.

²⁵³The educational, managerial, and administrative components of the regulation are necessary elements in an aggressive military campaign to eradicate sexual harassment. The overreaching punitive aspects of the regulation, however, are problematic. Interestingly, the mandatory processing for administrative separation provision contained in the regulation is more moderate than the punitive measures. The regulation mandates processing for quid pro quo and assaultive sexual harassment. **SECNAV INSTR. 5300.26B**, *supra* note 4, para. 8e. Accordingly, while a person could be court-martialed and suffer the **UCMJ** Article 92(2) maximum punishment for hostile environment sexual harassment conduct, that conduct likely would not trigger the mandatory administrative processing requirement contained in the regulation.

sion²⁵⁴ would eliminate much confusion and make it a preferable way to implement a sexual harassment ban.

Next, *quid pro quo* sexual harassment clearly is defined in one single subparagraph of the proposed statute.²⁵⁵ It has a specific intent requirement that the conduct occur with the intent to obtain sexual favors. Most importantly, the statutory offense stands on its own without need to resort to borrowed concepts from employment discrimination law—concepts that, unfortunately, are essential for making any sense of the regulatory offense.

Another flaw in the regulation is its failure to state a clear, constitutionally acceptable standard for hostile environment sexual harassment. Although this is also a problem in the statute, it has several components that ameliorate this deficiency. First, the statute itself²⁵⁶ and the proposed *Manual for Courts Martial* explanation²⁵⁷ clarify that the hostile environment is determined based on a completely gender-neutral, objective standard. The third-party "unwelcomeness" subjective analysis specifically is rejected. Instead, the subjective perceptions of victims and others, along with the intent of the perpetrator, are merely part of the totality of the circumstances.²⁵⁸ This is a workable legal standard—something woefully missing in the regulation.

Because of the inherent ambiguity of much of hostile environment sexual harassment, the statute creates a permissive evidentiary inference or presumption. If a person properly is informed by either a "victim" of sexual harassment or by a superior that his or her conduct is creating a hostile environment, and he or she subsequently repeats the same or similar conduct, a rebuttable presumption exists that a hostile environment has been created. This is a built-in notice provision that does much to allay the lack of notice concerns that are so pervasive in the regulatory hostile environment offense. The provision would encourage victims to report and confront offensive individuals and, at the same time, provide the offender with an opportunity to correct his or her misdeeds. "Yellow zone" conduct likely could not be prosecuted without first using this notice provision.

²⁵⁴The legislative proposal answers many of the questions that the regulation simply ignores. This was accomplished by drafting the proposed *Manual for Courts-Martial* paragraph containing the elements of the crimes, explanation, lesser included offenses, maximum punishments, and sample specifications.

²⁵⁵UCMJ art. 93a(a)(1) (proposed July 1992). The regulation's *quid pro quo* crime is blurred throughout the enclosure (1) definition.

²⁵⁶*Id.* first sentence.

²⁵⁷MCM, *supra* note 163, pt. IV, para. 18c(2)(c) (proposed July 1992).

²⁵⁸*Id.* pt. IV, para. 18c(2)(b)(ii), (c)(ii).

Finally, as far as the notice and ambiguity problems are concerned, much of the hostile environment sexual harassment in the statute is aligned with the service-discrediting or conduct-prejudicial-to-good-order-and-discipline concepts of the UCMJ.²⁵⁹ To create a hostile environment, the perpetrator must act in a manner that generally satisfies the criminality standard of Article **134**. The satisfaction of this standard likely will comply with the vagueness and notice requirements of *Parker v. Levy*. Tying creation of the hostile environment to the idea of service-discrediting conduct, or conduct prejudicial to good order and discipline, specifically aligns the statutory sexual harassment crime to the special disciplinary needs of the military that have been so critical in validating otherwise inherently vague prohibitions of conduct under Articles **133** and **134**.

The statutory provision on hostile environment sexual harassment also incorporates the "severe and pervasive" requirement taken from *Vinson*, which apparently was ignored in the regulation.²⁶⁰ The conduct of the accused must be severe and pervasive enough to prejudice discipline or to discredit the service. The joining of these two concepts adds significant content to a concept that is otherwise highly ambiguous. While the statutory hostile environment offense is certainly not without some problems in defining the hostile environment, it does provide an objective standard because it is based on a concept traditionally understood in military law. Anchored within the Article **134** standard, it stands on much firmer ground than the regulation.

The statute is also far less intrusive on controlling hostile environment speech than the regulation. The statute on its face²⁶¹ only regulates hostile environment conduct, whereas the regulation directly prohibits speech. Insofar as it only restricts speech incidental to regulation of expressive conduct, it is subject to the far less demanding test of *United States v. O'Brien*.²⁶² Direct regulation of speech arises only when the speech is so severe and pervasive that it creates the hostile environment as demonstrated by behavior that meets the "conduct prejudicial" or ((service discrediting" standard.²⁶³ Speech airing sexist political

²⁵⁹*Id.* pt. IV, para. 18c(2)(a)(i), (b)(i).

²⁶⁰*Id.* pt. IV, para. 18c(2)(b)(ii).

²⁶¹UCMJ art. 93a(a)(2) (proposed July 1992).

²⁶²391 U.S. 367 (1968). Under *O'Brien*, if the restriction is within the powers of the government and aims primarily at conduct with only an incidental restraint on speech, it can be upheld if a substantial government interest is advanced, the interest is unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms is carefully tailored. *Id.* at 377.

²⁶³MCM, *supra* note 163, pt. IV, para. 18c(2)(a)(i) (proposed July 1992).

sentiments would not appear to meet the "severe and pervasive" requirement. Furthermore, the inherent vagueness problem that Professor Browne identified as a major problem with Title VII hostile environment speech restrictions²⁶⁴ is allayed by the greater certainty of the standard.

The other speech deficiency identified by Professor Browne is the chilling effect on speech from the censorship deriving from employer liability for the harassment of employees.²⁶⁵ This problem is endemic in the regulation and exists to some extent in the statute. The degree of the problem is far less serious in the statute because the respondeat superior crime in the statute is defined more sharply, and the standard for criminality is heightened. The superior commits this crime under the statute only if he or she fails to take appropriate action, either willfully or through culpable negligence.²⁶⁶ While the statute has the same knowledge component as the regulation regarding the violations of subordinates, the statute describes the duty that it imposes (taking appropriate action) and provides a standard for determining violations of that duty (willfulness or culpable negligence). These aspects are completely missing in the regulation. Accordingly, the statute in this area is not only less ambiguous, but also far less likely to cause censorship or overreaching from supervisors who are concerned about their own exposures to criminal liability.²⁶⁷

In sum, the statute has far fewer obvious legal deficiencies than the regulation.²⁶⁸ It has greater technical precision than the regulation and would be much more workable. It is more self-contained with less reliance on concepts borrowed from employment discrimination law—concepts that become distorted when transposed into the criminal arena. The uniform applicability of the statute to the entire military is preferable to a piecemeal or hodgepodge approach between the services. Finally, the statute

²⁶⁴ See *supra* note 148 and accompanying text.

²⁶⁵ See *supra* note 149 and accompanying text.

²⁶⁶ MCM, *supra* note 163, pt. IV, para. 18b(3) (proposed July 1992).

²⁶⁷ The statute is still subject to the "underinclusiveness" free speech challenge flowing from *R.N.V. v. St. Paul*, 112 S. Ct. 2538 (1992). See *supra* text accompanying notes 151-157.

²⁶⁸ Proposed UCMJ Article 93a(c) is a limited preemption doctrine that will further the goal of consolidating prosecutions for work place sexual harassment in one standard provision. This section also clarifies the distinction between more serious and violent sex crimes such as rape, and milder, but still criminal, workplace harassment. On the negative side, the statute does not contain any provision prohibiting reprisals such as the regulation contains. In light of the absence of other UCMJ protections for sexual harassment victims and whistleblowers, a narrowly drawn provision criminalizing reprisal actions would be an improvement to the statute.

will provide a data basis for gauging the extent of sexual harassment offenses, and the progress made in rectifying the problems. While the statutory approach may be superior to the regulation drafted by the Navy, the issue remains as to whether any direct criminalization of sexual harassment is beneficial or necessary.

VII. Conclusion

The main effect of directly criminalizing sexual harassment is to outlaw the amorphous area of hostile environment conduct.²⁶⁹ Doing this, however, creates numerous legal and practical difficulties. Problems arise initially because the criminalization is based on the transfer of a civil standard into the military criminal law. Although Title VII terminology and concepts have been used, they have failed to provide an unambiguous, constitutionally viable standard for criminality. The artificial assimilation of civil employment discrimination law concepts into a regulation defining a criminal act fails to provide proper notice of what is prohibited conduct because civil law sexual harassment is aligned inherently with the subjective feelings of individuals who perceive the alleged criminal conduct or words. Therefore, the very same conduct might be acceptable or criminal, depending upon the perceptions of two different observers. Such vagaries are neither workable nor likely to pass constitutional muster.

An additional major constitutional problem with the criminalization of sexual harassment is that it attempts to regulate offensive speech. By precluding a wide array of speech, and only one type of offensive speech, the sexual harassment prohibition is subject to First Amendment challenges under various theories.

The other potential problems with criminalizing a civil concept are not as yet readily apparent.²⁷⁰ Criminalization, however, is certainly unnecessary because the UCMJ has an expansive set of criminal prohibitions that cover almost all imaginable criminal conduct that fits within the rubric of sexual harassment. These criminal statutes already have passed constitutional muster, provide adequate notice to satisfy the requirements of due process, and have a long history available for bench

²⁶⁹The direct criminalization also prohibits quid pro quo conduct, but such conduct already is criminally forbidden.

²⁷⁰In addition to the many problems with the regulation, command influence lurks as a potential problem area. Widespread policy pronouncements have been made concerning not only the problem, but also what must be done to perpetrators, especially in highly publicized cases such as Tailhook. Imaginative lawyers undoubtedly will discover many other problems with the regulation.

and bar to draw upon during prosecution of real sexual harassment crimes. Resort to special regulations or statutes was not needed to combat racial discrimination, and they are unnecessary to combat sexual harassment.

The heart of the problem in redressing sexual harassment in the armed forces has not been Congress's failure to expand the traditional coverage of the UCMJ so that it directly criminalizes specific forms of hostile environment conduct such as sexist remarks, tasteless jokes, and other offensive gestures. Instead, the problem has been the military leadership's failure to recognize that in many cases, like those arising in Tailhook, sexual mistreatment actually constitutes a serious assaultive crime that must be prosecuted accordingly.

Ironically, direct criminalization likely will cause two opposite, but yet related, damaging reactions to resolving the problem of sexual harassment in the military. First, because the regulation sweeps far too broadly in criminalizing conduct, the focus of attention changes from the truly criminal conduct that must be eliminated, to debates about the type of conduct that constitute "sexual harassment" and the overreaction of the regulation.

Second, because of the highly charged nature of the sexual harassment issue, the political agenda of interested parties, the inherently ambiguous and subjective nature of hostile environment sexual harassment, and the dynamics of fear of being criminally tolerant of subordinates' sexual harassment, an overaggressive enforcement of the regulation inevitably will occur. Individual rights will be victimized, and this misuse of the legal system will strengthen the resolve of those who are not serious about focusing on the main issue of real sexually-motivated crimes in the military. Accordingly, by focusing on "yellow zone" type conduct, the real problem will be obscured because all the energy of the participants in the controversy will be centered on the periphery.

None of the problems that the military, especially the Navy, has encountered in the area of sexual harassment stem from the inadequacy of its laws or its policies. The anti-sexual harassment policies have been in effect throughout the entire period when the most egregious and publicized abuses have occurred. These policies are more than adequate vehicles to prosecute the assaults, indecent exposures, and drunken conduct unbecoming officers for all past and future Tailhook-type incidents. Education, training, and administrative measures to resolve the sociological and institutional aspects of discrimination based on sex are being

implemented widely. Victims must be encouraged to report misconduct immediately, and commands must investigate and adequately dispose of charges in a timely fashion. The present law, however, is more than adequate to support the policies against sexual harassment.²⁷¹ Extensive substantive changes are not needed. What has been missing, and what is essential, is the leadership, dedication, and political will necessary to expose and timely resolve the problems. Without this type of dedication, no existing or future laws can do the job. With it, the existing legal tools for eradicating sexual mistreatment are in place and fully operational.

The Navy should revoke the punitive aspect of its regulation, and the other services should resist any movement toward direct criminalization of sexual harassment. If political pressure mandates criminalization, a statutory measure such as the proposed Article 93a is preferable to service regulations. A statute provides uniformity, increased legitimacy, more content, and less ambiguity. Such a statute decreases—but does not eliminate—the problems of infringement of protected speech and the ambiguous criminal standard.

Tinkering with the substantive law is simply not the answer to resolving the sociological problem of sexual harassment. Instead, the law as presently constituted will work effectively when officials display the resolve to do justice and enforce current policies and standards for equal treatment of men and women in the military.

²⁷¹One significant deficiency in current law is the lack of a direct prohibition against reprisals to sexual harassment whistleblowers. A provision like that contained in SECNAV INSTR. 5300.26B, *supra* note 4, para. 8b(2)—with the recommended addition of a scienter requirement—should be adopted uniformly for the services. This could be accomplished through issuance of a joint punitive regulation.

MILITARY RULE OF EVIDENCE 707: A BRIGHT-LINE RULE THAT NEEDS TO BE DIMMED

JOHN J. CANHAM, JR.*

I. Introduction

Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice.¹

-Justice Potter Stewart

On July 6, 1991, the military justice system swung its turret 180 degrees and decreed that polygraph evidence no longer would be allowed on the evidentiary battlefield.² The President promulgated the Military Rules Of Evidence³ (MRE) in 1980⁴ and, since then, numerous changes have been made.⁵ With the promulgation of MRE 707, the military courts went from being one of the more liberal federal jurisdictions on polygraph evidence,⁶ to becoming a jurisdiction in which the admission of such evidence was banned totally.⁷ The effect of MRE 707 is to remove all discretion from the military judge in the weighing of the legal and logical relevance of polygraph evidence.

*Major, United States Marine Corps. Presently assigned as Senior Defense Counsel, Camp Pendleton, CA. B.A., 1979, Providence College; J.D., 1992, Suffolk University; LL.M., 1993, The Judge Advocate General's School, United States Army. Former assignments include Legal Instructor, Naval Justice School, Newport, RI, 1988-1992; Defense Counsel, Legal Assistance Attorney, and Chief Trial Counsel, Marine Corps Air Station, El Toro, CA, 1984-1988; Trial Counsel, 3rd FSSG, Okinawa, Japan, 1983-1984. This article is based upon a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 41st Judge Advocate Officer Graduate Course.

¹Hawkins v. United States, 358 U.S. 74, 81 (1958).

²See *infra* Part III.A.

³MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID., (1984) [hereinafter MCM].

⁴Exec. Order No. 12,198, 45 Fed. Reg. 16932 (1980).

⁵See Exec. Order No. 12,233 (Sept. 1, 1980) (MIL. R. EVID. 302, 305(h), 317(c), 1101(b)); Exec. Order No. 12,306 (June 1, 1981) (MIL. R. EVID. 410); Exec. Order No. 12,315 (July 29, 1981) (MIL. R. EVID. 1101(c)); Exec. Order No. 12,473 (Apr. 13, 1984) (MIL. R. EVID. 201A, 312, 313, 314, 315, 316, 321); Exec. Order No. 12,550 (Feb. 19, 1986) (MIL. R. EVID. 304, 311, 609, 804(a)); Exec. Order No. 12,708 (Mar. 23, 1990) (MIL. R. EVID. 304(b), 506).

⁶See *United States v. Piccinonna*, 885 F.2d 1529, 1534-35 (11th Cir. 1989), *on remand*, 729 F. Supp. 1336 (S.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (1991) (surveying the various approaches and characterizing the military courts as having no prerequisites, excepting judicial scrutiny, to admitting polygraph evidence).

⁷MCM, *supra* note 3, MIL. R. EVID. 707, *as amended by* Exec. Order No. 12,767 (effective date 6 July 1991).

This attitude is reflective of the legal labyrinth through which polygraph evidence has traveled in its search for acceptance in the various court systems.⁸ In an age when technology reigns, the military seems unwilling to accept polygraph evidence even though it easily is controlled and analyzed, and potentially helpful to the trier of fact. Arguably, polygraph evidence has generated more controversy in its quest for judicial acceptance than any other type of evidence.⁹ Over the years, three general approaches have been used by various courts in the admissibility dilemma concerning polygraph evidence.¹⁰ The first approach, used by various federal circuit courts of appeals to include the Fourth, Fifth, D.C. Circuits, and now the military courts, is one of per se inadmissibility.¹¹ The second approach allows the introduction of polygraph evidence when both parties stipulate to various conditions. This approach has been adopted by the Eighth Circuit.¹² "The third approach allows admission of polygraph evidence in the discretion of the court upon finding that special circumstances are present, without requiring stipulation by the parties."¹³ These "special circumstances" range from permitting the introduction of polygraph evidence for a limited purpose, such as impeachment, to explaining why the government did not investigate a case fully.¹⁴ The common denominator that seems to explain the selective use of polygraph evidence is a belief in the ability of the trial judge to use the evidentiary rules in conforming polygraph evidence to accepted norms of admissibility.

The focus of this thesis is two dimensional in that the issues concerning the viability of MRE 707 are intertwined with the

⁸See W. Thomas Halbleib, *U.S. v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 *Ky. L.J.* 225, 226 (1991).

⁹See generally Williams, *Polygraph Test Results Inadmissible at Criminal Trials*, 24 *SUFFOLK U. L. REV.* 279 (1990).

"*Piccinonna*, 885 F.2d at 1533.

"*Id.* at 1534; *United States v. Brevard*, 739 F.2d 180 (4th Cir. 1984); *United States v. Clark*, 598 F.2d 994, 995 (5th Cir. 1979), *vacated*, 622 F.2d 917 (1980) (en banc), *cert. denied*, 449 U.S. 1128 (1981); *United States v. Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974). These circuits consistently have adhered to an approach of per se inadmissibility for polygraph evidence.

¹²*Id.*; *Anderson v. United States*, 788 F.2d 517, 519 (8th Cir. 1975); *United States v. Alexander*, 526 F.2d 161, 166 (8th Cir. 1975).

¹³See Mark W. Brennan, *Reexamining Polygraph Admissibility*, 56 *MO. L. REV.* 143, 150 (1991). This third approach favors a case-by-case determination as to the admissibility of polygraph evidence using nothing more than judicial scrutiny from the trial judge.

¹⁴*Piccinonna*, F.2d at 1535. The Tenth Circuit agreed with the rationale permitting the Government to introduce evidence that the defendant had failed a polygraph test to explain why the police detective had not conducted a more thorough investigation. The detective's theory was that he already had his man, so no further investigation was necessary.

possible admission of polygraph evidence into a court of law. The goal of this approach is to create a rational basis for the deletion of MRE 707 from the operative MREs. Accordingly, this study will explore various issues dealing with the admissibility of polygraph evidence within the boundaries of pre-MRE 707 case law. By showing the possible admissibility of polygraph evidence, the justification for a bright-line rule of exclusion is removed.

Additionally, this paper will analyze MRE 707's compatibility with case law, the MREs, and the rights of the accused. Using a comparative analysis with already existing MREs, a trend will be established showing MRE 707 to be inconsistent with both the goals and philosophy of the rules of evidence. This article also will review the impact of MRE 707 on an accused's constitutionally protected rights. By allowing for the possibility of admission, the government avoids constitutional violations that may result from any per se exclusion of evidence. This is especially true when the evidence conforms to already existing standards of admissibility as polygraph evidence does. As mentioned, the focus of this article will be on theories of admissibility and the propriety of MRE 707, and not a per se validation of the polygraph. Issues such as the competence of the examiner, generally accepted procedures, and the technical proficiency of the polygraph device will be discussed only to bolster the argument for a revocation of MRE 707.

The critics of polygraph evidence seem to forget that no evidence can be said to be one hundred percent accurate. Indeed, inaccuracy rates for eyewitness identification have been reported to be as high as thirty-nine percent,¹⁵ yet few courts hesitate to permit the eyewitness to take the stand and present this type of critical testimony. This same spirit of indulgence should control potentially relevant evidence, such as the testimony concerning the polygraph.

11. The Polygraph Machine

If there is ever devised a psychological test for valuation of witnesses, the law will run to meet it.¹⁶

The quest to differentiate truth from falsehood has been with humanity almost as long as the ability to lie. Historically a number of techniques have been employed to discern truth from falsehood. For example,

¹⁵Warren E. Leary, *The Eye-Witness is Never Wrong*, N.Y. TIMES, Nov. 15, 1988, at 8 (citing a study by Dr. Brian L. Cutler and Steven D. Penrod).

¹⁶J. H. WIGMORE, 2 WIGMORE ON EVIDENCE § 875, at 237 (2d ed. 1923).

It is said that more than 4000 years ago the Chinese would try the accused in the presence of a physician who, listening or feeling for a change in the heartbeat, would announce whether the accused was testifying truthfully. Others believed that a dry mouth better indicated deception. Dry mouth tests required suspected liars to chew rice flour, lick a hot iron, or swallow a slice of bread and cheese. If the rice flour remained dry, the hot iron burned the suspected liar's tongue ...¹⁷

Unfortunately, even after almost eighty years of study and development, apparently some equate the polygraph machine with the rice flour test.

"The so-called polygraph was in existence as early as 1908 as an instrument used in connection with medical examinations by Dr. James Mackenzie, an English heart specialist."¹⁸ Over the years the polygraph machine has been the focus of extensive scientific research culminating in a device widely used.¹⁹

The polygraph is a machine that objectively measures and records physiological changes in an individual, and has been the focus of critiques and supporters for years.²⁰ The polygraph device is best described as "an electronic instrument comprised of four components: the pneumograph chest assembly which measures the inhalation/exhalation ratio; the galvanic skin response (graph) which measures skin resistance and perspiration changes; the cardiosimulgraph which measures blood pressure and pulse rate; and the kymograph," which permits recordation of the examinee's reaction.²¹

The underlying theory on which the polygraph is based is the assumption that consciously lying is stressful, and that this stress manifests itself in physiological responses which can be recorded and objectively analyzed.²² Assumptions inherent in the

¹⁷Halbleib, *supra* note 8, at 229.

¹⁸John A. Ronayne, *Admissibility of Testing by the Psychological Stress Evaluator*, 9 PACE L. REV. 243, 246 (1989).

¹⁹Raskin, *Science, Competence, and Polygraph Techniques*, 8 CRIM. DEF. 11, 13 (May-June 1981); see also Dep't of Defense, *The Accuracy and Utility of Polygraph Testing* (1984), reprinted in 13 POLYGRAPH 1, 58 (1984) ("There has been more scientific research conducted on lie detectors in the last six years than in the previous 60 years").

²⁰Ronayne, *supra* note 18, at 247.

²¹United States v. Rodriguez, 34 M.J. 562 (A.C.M.R. 1991). The court held that polygraph evidence was relevant on the issue of the accused's credibility after the accused took the stand and denied the charge of using cocaine. This case was arraigned prior to the promulgation of MRE 707, and therefore was unencumbered by the rule.

²²United States v. Piccinonna, 885 F.2d 1529, 1537 (11th Cir. 1989).

theoretical underpinning of the polygraph include the following: (1) individuals are not able to control their physiologies and behavior; (2) that specific emotions can be triggered by specific stimuli; (3) that specific relationships between the different aspects of behavior exists (such as what people say, how they behave, and how they respond physiologically), and (4) that no differences among people exist, so that most people will respond similarly.²³ Various examination techniques may be employed, but the most widely used is the control question technique.²⁴ The physiological reactions result from the various questions asked by the examiner.²⁵ In the control question technique three types of questions are used to illicit responses: relevant, control, and irrelevant.²⁶ "Relevant questions deal with the specific incident under investigation;²⁷ control questions involve matters similar to that being investigated but different in time and category;²⁸ irrelevant questions are unrelated to the incident under investigation"²⁹ and are used to obtain normal truthful reactions.³⁰ The responses are interpreted by the examiner³¹ who subjectively analyzes the charts produced by the machine.³² In addition to the objective information in the charts, the examiner also may incorporate the subject's demeanor, body language, attitude, and responses in his or her evaluation.³³

Arguably, the most important factor in the polygraph examination, and the evolution towards reliability, is the individual examiner. Using his or her ability, experience, and education, the examiner essentially applies something close to an interpretive art form in reviewing the charts.³⁴ The findings of the examiner will result in one of three conclusions; that

²³*Id.* at 1538.

²⁴See LYKKEN, A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR, ch. 4 (1981).

²⁵Horvath & Reid, *The Reliability of Polygraph Examiner's Diagnosis of Truth and Deception*, 62 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 276, 279 (1971).

²⁶Rodriguez, 34 M.J. at 563.

²⁷An example of a relevant question would be, "Did you stab Bob with the knife?"

²⁸An example of a control question would be, "Have **you** ever hurt any one before?"

²⁹Rodriguez, 34 M.J. at 563.

³⁰An example of an irrelevant question would be, "Is your name Bob?"

³¹Horvath & Reid, *supra* note 25, at 279. "Generally, the truthful person will respond more to the control questions than to the relevant questions because they represent a greater threat to him. For the same reason the deceptive person will respond more to the relevant questions than to the control questions." *Id.*

³²Halbleib, *supra* note 8, at 232.

³³*Id.*

³⁴*Id.*

deception was indicated, no deception was indicated, or that the test results were inconclusive.³⁵

What may be of equal importance in understanding the polygraph device is knowing what it is not. "There is no lie detector. The Polygraph is not a lie detector, nor does the operator who interprets the graph detect lies. The machine records physical responses which may or may not be connected with emotional reactions."³⁶ Theory, machine, and operator all come together to form the specific data barred by MRE 707.

III. The Rule: Military Rule of Evidence 707

There is no Pinocchio response. If you lie your nose does not grow a half an inch longer or some other bodily response.³⁷

A. *The Historical Background of Polygraph Evidence*

Prior to 1987, the results of polygraph examinations were inadmissible at courts-martial.³⁸ To a large extent, this was because of the "general acceptance requirement" first enunciated in the 1923 case of *Frye v. United States*,³⁹ and incorporated into paragraph 142e⁴⁰ of the *Manual for Courts-Martial, 1969* (Rev.).⁴¹ The *Frye* standard stood for the proposition that, to be admissible, scientific evidence generally must be accepted "in the particular field in which it belongs."⁴² With the promulgation of the MREs,⁴³ the blanket prohibition against polygraph evidence was

³⁵David Lykken, *The Right Way to use a Lie Detector*, 8 PSYCHOL. TODAY 56, 58 (1975).

³⁶H.R. Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). The House Committee on Government Operations took a strong stand against the reliability of polygraphs in concluding, "There is 'no lie detector,' neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth or falsehood." *Id.* at 1.

³⁷*Id.* (comments by Dr. John F. Beary III).

³⁸*See, e.g.*, *United States v. Ledlow*, 29 C.M.R. 475 (C.M.A. 1960). This was a larceny case in which polygraph testimony inadvertently crept into the record. The court reaffirmed the inadmissibility of the polygraph testimony, but found harmless error.

³⁹293 F. 1013 (D.C. Cir. 1923).

⁴⁰MANUAL FOR COURTS-MARTIAL, *United States*, ¶ 142e (rev. ed. 1969) [hereinafter 1969 MANUAL], *deleted by id.* change 5 (effective 1 Apr. 1981).

⁴¹1969 MANUAL, *supra* note 40, ¶ 142e.

⁴²*Frye*, 293 F. at 1014.

⁴³Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

discarded and the precedential value of Frye declined.⁴⁴ This diminished vitality resulted from a conflict with the newly created MREs⁴⁵—specifically MREs 401 thru 403,⁴⁶ and MRE 702.⁴⁷ The drafters' analysis to MRE 702 specifically states that the rule may be broader and may supersede the Frye standard.⁴⁸

The decision in *United States v. Gipson*⁴⁹ judicially clarified that Frye was no longer the controlling case in determining the admissibility of novel scientific evidence. Rather, if used at all, the Frye test now has been relegated to a useful component in determining the probative value of evidence.⁵⁰

Through *Gipson*, the Court of Military Appeals expanded the admissibility equation for expert testimony generally, and polygraph evidence in particular, by focusing on MREs 401, 402, and 702.⁵¹ Once basic relevance is established under MREs 401 thru 403, MRE 702 imposes the marginal burden that scientific evidence "assist the trier of fact to understand the evidence or to determine a fact in issue."⁵² Simply put, the question to be answered is whether the evidence is reliable enough to be helpful in resolving the issues.⁵³ "Reliability can be established by showing the degree to which the procedure or technique is accepted within the scientific community."⁵⁴ The reliability test appears to be based on Frye, but in an advisory capacity. In this context, general acceptance is a factor that may or may not persuade on the point of admissibility.⁵⁵ The *Gipson* decision did not make polygraph evidence per se admissible; rather it merely held that it was not per se inadmissible.⁵⁶ Finally the court concluded, "The greater weight of authority indicates that [the polygraph] can be a helpful scientific tool."⁵⁷

⁴⁴ Donald F. O'Connor, Jr., *The Polygraph: Scientific Evidence on Trial*, 37 NAVAL L. REV. 97, 102 (1988) (citing S. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 589 (1986)).

⁴⁵ See *supra* notes 3-4 and accompanying text.

⁴⁶ MCM, *supra* note 3, MIL. R. EVID. 401, 402, 403.

⁴⁷ *Id.* MIL. R. EVID. 702.

⁴⁸ *Id.* MIL. R. EVID. 702 analysis, app. 22, at A22-45.

⁴⁹ *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

⁵⁰ Craig P. Wittman, U.S. v. *Gipson: Out of the Frye Pan, into the Fire*, ARMY LAW., Oct. 1987, at 11.

⁵¹ O'Connor, *supra* note 44, at 104.

⁵² MCM, *supra* note 3, MIL. R. EVID. 702; see also *Gipson*, 24 M.J. at 251. The court reviewed the relatively low standard of reliability needed for the admission of expert testimony.

⁵³ O'Connor, *supra* note 44, at 105.

⁵⁴ *Id.* at 106.

⁵⁵ *Gipson*, 24 M.J. at 252.

⁵⁶ See *United States v. West*, 27 M.J. 223 (C.M.A. 1988).

⁵⁷ *Gipson*, 24 M.J. at 249.

Since the *Gipson* case, and prior to the creation of MRE 707, numerous cases dealt with the polygraph controversy. Case after case reflects one or both sides being allowed to lay the foundation for admissibility, only to see the military judge refuse to allow it in for a variety of reasons.⁵⁸ The various reasons given to support exclusion include minimal probative value,⁵⁹ not probative of the witness's character for truthfulness,⁶⁰ and lack of relevancy resulting from the accused's failing to take the stand.⁶¹ Often, the Court of Military Appeals or the courts of review will cite error at the trial level for failing to follow the *Gipson* opinion or excluding the polygraph evidence, but will affirm, citing harmless error.⁶² Obviously, one result of the *Gipson* decision was not to immerse the courts in polygraph evidence. Nevertheless, the trend of the various polygraph cases seemed to point to the potential acceptance of polygraph evidence. The genesis of MRE 707 is surprising when viewed in the context of the *Gipson* decision and its progeny.

B. Military Rule of Evidence 707

Military Rule of Evidence 707 provides as follows:

RULE 707. Polygraph Examinations.

(A) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(B) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.⁶³

⁵⁸United States v. Rodriguez, 34 M.J. 566 (A.C.M.R. 1991) (polygraph examination results were relevant to credibility of accused who testified he did not use cocaine).

⁵⁹In United States v. Joyner, 29 M.J. 209 (C.M.A. 1989), the Court of Military Appeals stated that an accused's willingness to take a polygraph usually should not be admitted as proof of his or her innocence because of its minimal probative value.

⁶⁰In United States v. Tyler, 26 M.J. 680 (A.F.C.M.R. 1988), the defense counsel tried to impeach a Government witness by trying to introduce the fact that the witness had refused to take a polygraph. The Air Force Court of Military Review agreed with the trial judge's decision that the evidence had no probative value toward the accused's guilt.

⁶¹In United States v. Abeyta, 25 M.J. 97 (C.M.A. 1987), the court upheld the trial judge's decision to exclude evidence of the polygraph. Initially, the trial judge had allowed the defense counsel to lay the foundation for the admission of the exculpatory polygraph, but excluded it when the accused failed to testify.

⁶²See United States v. Berg, 30 M.J. 195 (C.M.A. 1990); United States v. Allen, 24 M.J. 450 (C.M.A. 1987).

⁶³MCM, *supra* note 3, MIL. R. EVID. 707.

Military Rule of Evidence 707(A) creates a bright-line rule of exclusion that excludes all evidence relating to the results of polygraph examinations. As a result, a military judge cannot entertain any motion seeking admission of polygraph evidence, nor allow the proponent even to try to establish reliability. Interestingly, MRE 707(B) seems to acknowledge the continued use of the polygraph device in the military. The rule indicates that any statements that are elicited lawfully during the polygraph procedure may be admissible, presumably as admissions by the accused. Apparently the drafters of MRE 707 anticipated and acknowledged that the polygraph machine would continue to be used regularly as an investigative tool. This is an anomalous position to take, because the bright-line rule seems to be rooted in the belief that the polygraph device is inherently unreliable. The drafters' justification for the creation of this bright-line rule is found in the analysis and reflects often-argued points in opposition to the polygraph.

C. Justification for the Bright-Line Rule

The drafters of MRE 707 cited four areas of concern in justifying the need for a bright-line rule of exclusion. They include the following: (1) the fear that court members would be misled, (2) a confusion of issues would arise, (3) the trial would incur a substantial waste of time, and (4) that the polygraph is inherently unreliable. These reasons are the basis for the drafters' position that polygraph evidence would impinge on the integrity of the military judicial system. To avoid redundancy, these four specific areas will be detailed in the following sections.⁶⁴

*1. Court Members May Be Misled.—*The impetus for the bright-line rule is based on several policy grounds.⁶⁵ The first of which is the fear that the members will be misled by the polygraph evidence. The analysis cites *United States v. Alexander*,⁶⁶ in which the court opined as follows:

When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. ... Present day jurors, despite their sophistication and increased educational levels and intellectual capacities, are likely to give significant, if not conclusive, weight to a polygraphist's opinion ... [t]o the extent that the

⁶⁴See also *infra* Parts IV, V.

⁶⁵MCM, *supra* note 3, MIL. R. EVID. 707 analysis, at A22-46.

⁶⁶*United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975).

polygraph's results are accepted as unimpeachable or conclusive by jurors, despite cautionary instructions by the trial judge, the juror's traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.⁶⁷

2. Confusion of the Issues.—The second basis given by the drafters is that the consideration of polygraph evidence may lead to a confusion of the issues by forcing a determination as to the legitimacy of the offered evidence. The drafters referred to *State v. Grier*,⁶⁸ in which the court held that polygraph evidence could not be admitted under any circumstances. The *Grier* court was concerned that polygraph evidence may overwhelm the members and that the device itself was “inherently unreliable”.⁶⁹

3. Substantial Waste of Time.—The next articulated rationale is the belief that a substantial waste of time will be expended in the qualifying of polygraph evidence as reliable and competent.⁷⁰ The drafters also seemed concerned that polygraph evidence would place a burden on the administration of justice that would outweigh the probative value.

4. Lack of Reliability.—Finally, the drafters criticized the reliability of polygraph evidence and stated that “polygraph evidence has not been sufficiently established” and would impinge on the integrity of the judicial system. The drafters, seemingly wanting to avoid resurrecting the controversy of *Frye-Gipson-MRE 702*, emphasized that the rule is not intended to accept or reject any of the legal dogma surrounding expert testimony.

Generally speaking, if one was to accept the reasons advanced by the drafters, one must agree to certain initial premises. First, the adversarial system is a failure and the competent use of pretrial preparation and effective cross-examination pales in comparison to the testimony of the polygraph examiner. Second, the members are incapable of following or understanding the military judge's instructions in this area. Third, the military judge is incapable of applying long-established evidentiary rules to polygraph evidence.⁷¹ To accept the above assumptions, however, would be to crack the bedrock on which the military judicial system is founded. While a variety of intuitive arguments against the drafters' analysis are available,

⁶⁷*Id.* at 168.

⁶⁸300 S.E. 2d 351 (N.C. 1983).

⁶⁹*Id.* at 352.

⁷⁰*People v. Kegler*, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987).

⁷¹MCM, *supra* note 3, MIL. R. EVID. 402, 403.

the next important point is one the drafters did not address—the issue of due process.

IV. Due Process and the Polygraph

It is always the best policy to speak the truth, unless of course you are an exceptionally good liar.⁷²

The adoption of a rigid rule of evidentiary exclusion ultimately must be analyzed from a constitutional perspective. In this critical context, a review of the Due Process⁷³ and Compulsory Process⁷⁴ Clauses of the Constitution reveal potential challenges to the validity of MRE 707. In the case of *In Re Oliver*,⁷⁵ Mr. Justice Black, in his opinion for the Court identified these basic rights.

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and be represented by counsel.⁷⁶

These rights are not without some constraints. As Judge Cox noted in the *Gipson* decision, "[A] few courts have experimented with the notion that the accused has an independent constitutional right to present favorable polygraph evidence. We do not subscribe to this theory because there can be no right to present

⁷²Jerome K. Jerome, *The Idler* (1892), reprinted in *DICTIONARY OF QUOTATIONS*, (Bergen Evans, ed. 1978).

⁷³U.S. CONST. amend. V, provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

⁷⁴U.S. CONST. amend. VI, provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

⁷⁵333 U.S. 257 (1948).

⁷⁶*Id.* at 273.

evidence ... unless it can be shown to be helpful and relevant.”⁷⁷ If polygraph evidence has the potential to be material and relevant, than any per se rule of exclusion must be scrutinized closely. The constitutionality of an exclusionary rule designed to ensure receipt of trustworthy evidence, but which has the effect of unconstitutionally limiting the Sixth Amendment right of an accused to present favorable evidence, has surfaced in a number of Supreme Court cases.

A. *Applicable Constitutional Precedents*

The Supreme Court, in *Rock v. Arkansas*,⁷⁸ addressed whether a criminal defendant's right to testify may be restricted by a state rule that categorically excluded hypnotically refreshed testimony. Vickie Rock had been charged and convicted for manslaughter in the death of her husband. Prior to trial, Rock was put under hypnosis to remember details surrounding the firing of the gun that had killed her husband. The trial court refused to admit the hypnotically refreshed testimony and this ruling greatly limited the accused's testimony at trial.⁷⁹ The Arkansas Supreme Court affirmed, holding that the constitutional dangers of exclusion were not outweighed by the probative value of the evidence. The Supreme Court reversed, and opined that the Arkansas statute prohibiting this type of evidence was overly restrictive. Surprisingly, the Court refused to endorse, without reservation, the use of hypnosis as an investigative tool. Further, the Supreme Court viewed the scientific understanding of the phenomenon, and of the means to control the effect of hypnosis, as still being in their incipient stages.⁸⁰ The Supreme Court's lack of confidence in hypnotically induced testimony did not hinder its apparent inclination to protect such testimony from wholesale exclusion. The Court explained that “a state's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual's case.”⁸¹ In other words, the Court found the possible exclusion of reliable evidence, without consideration of the circumstances surrounding the collection of said evidence, constitutionally offensive. The Court also noted that evidentiary rules that limit the presentation of the defense cannot be arbitrary or disproportionate to the purpose for which it serves. The Court observed that cross-examination was

⁷⁷ *Gipson*, 24 M.J. at 252. The *Gipson* court cited *Chambers* and *Washington v. Texas* to conclude that when scientific evidence is helpful, relevant, and not unduly prejudicial, it has a role to play in criminal litigation.

⁷⁸ 483 U.S. 44 (1987).

⁷⁹ *Id.* at 46-48.

⁸⁰ *Id.* at 61.

⁸¹ *Id.*

one means to highlight inconsistencies,⁸² as would the proper use of jury instructions. Note that the Arkansas exclusion applied to the testimony of defendants, but not the testimony of other witnesses; it therefore may have received a more rigorous analysis.⁸³

One of the first cases to interpret the Compulsory Process Clause was *Washington u. Texas*.⁸⁴ The accused had been charged with and found guilty of murder. At trial, the accused denied committing the murder, theorizing that someone else had pulled the trigger. The defense's alibi witness previously had been convicted of the same murder and was serving a lengthy jail term. The accused sought to put this other individual on the stand to testify as to who actually pulled the trigger and what role the accused played in trying to prevent the act of violence. Two Texas statutes then in existence prevented persons charged or convicted as co-participants in the same crime from testifying for one another.⁸⁵ On the basis of these two statutes, the trial judge refused to allow the accomplice to testify. The Supreme Court reversed, holding that the Compulsory Process Clause provides the accused with the right to obtain witnesses in his or her favor and the right to have them testify. The Supreme Court recognized the rationale in preventing a co-indictee from testifying, but the effect of this presumption of unreliability was to preclude relevant and material testimony. This resulted in contravening the accused's right to compulsory process.⁸⁶

The right to call witnesses on one's own behalf again was raised in *Chambers u. Mississippi*.⁸⁷ In that case, the Supreme Court recognized that the right to call witnesses in one's own behalf is an essential component of constitutional due process.⁸⁸ Leon Chambers was tried by a jury in a Mississippi trial court, and convicted for murdering a policeman. Along with a general denial to the charge, Chambers sought to introduce four statements of a Mr. McDonald, who had independently confessed to the charged crime on a number of occasions. Chambers also sought to admit the testimony of three witnesses who would had corroborated McDonald's confessions.

The State refused to call McDonald, leaving Chambers no alternative but to call him as his own witness. On direct

⁸² *Id.*

⁸³ Halbleib, *supra* note 8, at 248.

⁸⁴ 388 U.S.14 (1967).

⁸⁵ *Id.* at 16-17. The Texas statute created an irrebuttable presumption based on the assumption that an accomplice was inclined to lie to save a co-accused.

⁸⁶ *Id.* at 20-24.

⁸⁷ 410 U.S.284 (1973).

⁸⁸ Halbleib, *supra* note 8, at 245.

examination, Chambers was able to lay the foundation for McDonald's out-of-court confession and it was read to the jury. On cross-examination, the state elicited Mr. McDonald's repudiation of the confession, as well as his version of what transpired the night of the killing. These points were extremely damaging to Chambers. Because of Mississippi's antiquated "voucher rule," which precluded the impeachment of one's own witness, Chambers was unable to cross-examine McDonald, or to call the other witnesses whose testimony would have discredited McDonald's repudiation and demonstrated his complicity.⁸⁹ The state court also cited the hearsay rule as a bar to some of the statements incriminating McDonald. Mississippi recognized declarations against pecuniary interest as an exception to the hearsay rule, but recognized no such exception for declarations such as McDonald's, which were against an accused penal interests.⁹⁰

The Supreme Court first addressed the voucher rule stating, "The right to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process."⁹¹ The Court went on to say that this was not an absolute right and could succumb to other legitimate interests. Still, the Court dismissed the voucher rule as no longer having any application "to the realities of the criminal process."⁹² The Supreme Court viewed the antiquated voucher rule as having little or no legitimate interests that would justify the exclusion of critical evidence for the defense.

The Supreme Court then addressed the hearsay bar by acknowledging that the justification in admitting hearsay statements is found in the statement's indicia of trustworthiness. The Court observed, "The testimony rejected by the trial court did contain persuasive assurances, and thus was well within the basic rationale of the exception for declarations against interests."⁹³

Since this decision, a number of commentators have indicated their belief that *Chambers*, like *Washington*, could be read to require the admission of polygraph evidence—at least when a proper foundation demonstrated the reliability of the evidence, and the evidence was critical to the case.⁹⁴ Both cases can be viewed as situations in which constitutional demands overrode state evidentiary rules of exclusions. In *State v.*

⁸⁹*Chambers*, 410 U.S. at 285-89.

⁹⁰*Id.* at 298-99.

⁹¹*Id.* at 294.

⁹²*Id.* at 296.

⁹³*Id.* at 302.

⁹⁴See Hableib, *supra* note 8, at 247 (citing Note, *Admission of Polygraph Results: A Due Process Perspective*, 55 IND. L.J. 157, 189-90 n.124 (1980)).

Dorsey,⁹⁵ the New Mexico Supreme Court viewed restrictions on the admission of polygraph evidence as "inconsistent with concepts of due process."⁹⁶ In *Dorsey*, the New Mexico Supreme Court held that polygraph results are admissible if (1) the operator is qualified, (2) the testing procedures were reliable, and (3) the test of the particular subject was valid.⁹⁷ *Dorsey* indicates the New Mexico Supreme Court's willingness to concede both the importance of polygraph evidence, and the allowance of the proponent to establish reliability. This is consistent with the argument arising out of *Chambers* that, when polygraph evidence is critical to the defendant's case and contains adequate indicia of trustworthiness, admissibility may be mandated by the Compulsory Process Clause.⁹⁸

B. Conclusion

Washington, *Chambers*, and *Rock* all demonstrate the Supreme Court's willingness to scrutinize exclusionary rules of evidence that exclude critical evidence.⁹⁹ The common analysis used by the Supreme Court in the *Rock* and *Chambers* decisions is to look at whether a rule of exclusion that purports to exclude favorable evidence advances a valid state purpose.¹⁰⁰ The Court's methodology then would encompass the question of whether the evidence has the potential to be reliable and trustworthy. If so, the Court will closely examine the exclusionary rule for possible due process violations.¹⁰¹ Given the tenor of the Supreme Court's description of hypnotically refreshed testimony in *Rock*, polygraph evidence certainly could not have received less of a vote of confidence.¹⁰² Further, the Supreme Court put the burden on the state to show how hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable an accused from testifying on his or her own behalf.¹⁰³ The *Rock* analysis of the Due Process Clause seems to mandate the admission of evidence

⁹⁵ 539 P.2d 204 (N.M. 1975); see also *Tafoya v. Baca*, 702 P.2d 1001 (N.M. 1985) (arguing that *Chambers* may require admission of polygraph evidence when critical to the defense).

⁹⁶ Halbleib, *supra* note 8, at 247.

⁹⁷ *Dorsey*, 539 P.2d at 205; see also *State v. Urioste*, 617 P.2d 156, 159 (N.M. 1980) (error to preclude cross-examination of examiner concerning chart and scoring); *State v. Bell*, 560 P.2d 925, 929-30 (N.M. 1977) (inconclusive results are irrelevant and therefore inadmissible).

⁹⁸ *Dorsey*, 539 P.2d at 247.

⁹⁹ *Id.* at 248.

¹⁰⁰ *Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

¹⁰¹ See Halbleib, *supra* note 8, at 249.

¹⁰² *Id.*

¹⁰³ *Id.*

that could corroborate the reliability of the polygraph, paving the way towards admission.¹⁰⁴ The application of MRE 707 to potentially reliable polygraph evidence would seem to contradict the holding in *Rock*. Therefore, the constitutionality of MRE 707 is very questionable. If polygraph evidence is reliable and critical, the *Chambers* rationale implies that this type of evidence is required by the Constitution “in the sense that the defendant will be otherwise unable to provide credible evidence of an important fact.”¹⁰⁵

V. Military Rule of Evidence 707: A Contradiction Within the Military Rules of Evidence.

An expert is one who knows more and more about less and less.¹⁰⁶

In addition to the constitutional questions surrounding MRE 707, a sense of uniqueness seems to guide the rule. When comparing MRE 707 with some of the other MREs one notices a pattern of inconsistencies, contradictions, and unnecessary duplications. A comparison of MRE 707 with some of the other MREs would be helpful to understanding MRE 707's context. This comparison will highlight that MRE 707 is statutorily defective, while concurrently justifying the possible admission of polygraph evidence. Both issues appear to be interwoven; that is, a denunciation of MRE 707 also works to bolster the argument supporting the admissibility of polygraph evidence.

A. Military Rule of Evidence 702.

The MREs make no distinction between “expert” testimony and “experimental” or “scientific evidence.” Military rule of evidence 702 highlights that any testimony based on scientific, technical, or specialized knowledge may qualify as expert testimony. Military Rule of Evidence 702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.¹⁰⁷

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ T.S. Elliot, *Whispers of Immortality*, reprinted in *DICTIONARY OF QUOTATIONS*, *supra* note 72, at 89.

¹⁰⁷ MCM, *supra* note 3, MIL. R. EVID. 702.

Read in conjunction with MREs 703 through 705, MRE 702 expands the admissibility of expert testimony in the courtroom.¹⁰⁸ The Court of Military Appeals discussed this expansionist view in *United States v. Snipes*.¹⁰⁹ In *Snipes*, the accused, who was charged with child molestation, offered testimony challenging the veracity of the victim. In rebuttal, the Government put a psychologist on the stand who testified that, in his opinion, the victim was truthful in her allegations and that her mental state was consistent with having been sexually abused.¹¹⁰ The Court of Military Appeals upheld the admission of the child psychologist's testimony, which established behavior profiles for sexually abused children. The court based its decision on the lack of an articulated objection by the defense and the defense's having opened the door in this area. Further, the court found no abuse of discretion in allowing the receipt of this evidence on the credibility of the child, but refused to allow any expert testimony on guilt or innocence. This case is a good example of how far The Court Of Military Appeals will go in admitting expert testimony. Even behavior profile testimony, which is often tantamount to improper comment on the ultimate issue, is allowed in under MRE 702. Behavior profile testimony often bolsters the credibility of the victim, thereby creating an inference that the victim is truthful and the criminal acts occurred. This testimony actually is the subjective personal observations by the doctor of the victim. A comparison of behavior profile testimony and the polygraph reveals striking similarities. Both types of evidence flow from the subjective interaction by an expert, which causes an opinion on the credibility of the subject. In his concurring opinion in *Snipes*, Chief Judge Everett warned about the possible inequities of allowing this type of behavior profile evidence to be admitted, yet shunning polygraph evidence.¹¹¹ Chief Judge Everett stated that "an anomaly will exist if we continue to exclude the opinion of polygraph operators ... but receive in evidence the opinion of various other experts about whether a victim or other witness has been telling the truth."¹¹²

The Court of Military Appeals went even further in this expansive view of expert testimony in *United States v. Gipson*. In *Gipson*, the court interpreted MRE 702 to encompass all evidence that may prove helpful.¹¹³ The court opined that helpfulness is determined by balancing the following three factors:

¹⁰⁸ See O'Connor, *supra* note 44, at 104.

¹⁰⁹ 18 M.J. 172 (C.M.A. 1984).

¹¹⁰ *Id.* at 177.

¹¹¹ See O'Connor, *supra* note 44, at 104.

¹¹² *Snipes*, 18 M.J. at 180.

¹¹³ O'Connor, *supra* note 44, at 104.

(1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.¹¹⁴

These are the principles to be considered in reviewing polygraph evidence under MRE 702. If polygraph evidence is deemed helpful to the factfinder through an analysis of the above three principles, one questions the validity of MRE 707. Polygraph evidence often is referred wrongly as experimental or scientific evidence.¹¹⁵ It is actually expert opinion evidence, based on the application of a scientific principle to data collected by the expert.¹¹⁶ Although the polygraph charts should be introduced to establish the foundation for the testimony, the heart of the evidence is the examiner's opinion as to whether or not the subject was truthful in answering certain questions. In deciding if polygraph evidence is properly admitted under MRE 702, the balancing test enumerated in *Gipson* must be applied. The first issue to be addressed is that of reliability.

1. Military Rule of Evidence 702: The Reliability of *the* Polygraph.—In analyzing for reliability, the court first should examine the principles underlining the expert testimony. Some scientific principles are so well established that courts routinely—and without explicit acknowledgement—take judicial notice of their validities, thereby permitting expert testimony based thereon.¹¹⁷ For example, a court often will take judicial notice of fingerprint and ballistic evidence,¹¹⁸ recognizing, for example, that no two fingerprints are identical or that no two bullets fired from different guns have identical markings. If the underlying premise is not yet certain, the proponent of the evidence must establish it by presenting proof of its validity. The reliability of the polygraph device long has been the topic of judicial and scientific scholars.¹¹⁹ In *United States v. Ridling*,¹²⁰ the court

¹¹⁴*Gipson*, 24 M.J. at 251 (quoting *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985)).

¹¹⁵C.T. McCORMICK, *McCORMICK ON EVIDENCE* 505 (2d ed. 1972).

¹¹⁶*Id.*

¹¹⁷*MCM*, *supra* note 3, *MIL. R. EVID.* 201 (specifically giving a military judge the prerogative to take judicial notice sua sponte).

¹¹⁸*United States v. Downing*, 753 F.2d 1224, 1234 (3d Cir. 1985).

¹¹⁹*See generally* Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 *UTAH L. REV.* 29; Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury Plagued System*, 26 *HASTINGS L.J.* 917 (1975).

¹²⁰350 F. Supp 90 (E.D. Mich. 1972).

discussed various techniques used by examiners, stating that "nothing in the different techniques casts doubt about the theory behind the polygraph."¹²¹ In the court's view, polygraph evidence was indeed helpful and, in analyzing the issue, the court noted that cases barring polygraph evidence "were not persuasive insofar as they are predicated on the unreliability of the polygraph."¹²² In *McMorris v. Israel*,¹²³ the Seventh Circuit Court of Appeals noted in its opinion the high accuracy rates of polygraph results. This conclusion is backed by various studies.

Many scientific studies show accuracy rates for polygraph testing well in excess of ninety percent.¹²⁴ One such study had a polygraph examiner testing statements from underground criminal informants—a group not known for its veracity, and correctly identified 102 out of 106 statements as true or false.¹²⁵ Perhaps the best indication that polygraph test results are highly reliable is the ability of one polygraph examiner to examine the charts of another and reach the same conclusions. Gordon J. Barland of the University of Utah conducted an experiment¹²⁶ in which he administered polygraph examinations to seventy-two subjects who were participants in a mock crime situation. The subjects who had committed the crime (a taking of ten dollars) were told they could keep the money if they successfully could avoid detection. Three separate charts were recorded on each of the subjects and the relevant responses were scored on a continuum ranging from negative three (deception) to positive three (nondeception). Only the charts were submitted to five polygraphers from the Army's Military Police School in Fort Gordon, Georgia. The five examiners knew nothing about the individual subjects except for what appeared on the polygraph charts and the wording of the questions. The responses of each subject were scored by each

¹²¹*Id.* at 95.

¹²²*Id.*

¹²³ 643 F.2d 458 (7th Cir 1981), *cert. denied*, 455 U.S. 967 (1982). The accused was charged with robbery and, prior to trial, contacted the government to stipulate to the admissibility of a future polygraph. This was done in accordance with Wisconsin's stipulation rule, which allowed for the admission of polygraph evidence if it was stipulated. The prosecutor refused to enter into a stipulation, and the accused's previously taken (but unstipulated) polygraph was ruled inadmissible. The Seventh Circuit Court of Appeals reversed the conviction, stating that the unjustified refusal by the Government may have violated the accused's due process rights.

¹²⁴ See R. Pfaff, *The Polygraph: An Invaluable Judicial Aid*, 50 A.B.A. J. 1130, 1132 (1964); see also Horvath & Reid, *supra* note 25, at 279.

¹²⁵ Blum & Osterloj, *The Polygraph Examination as a Means for Detecting Truth and Falseness in Stories Presented by Police Informants*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 133, 136-37 (1968).

¹²⁶ Gordon J. Barland, *The Reliability of Polygraph Chart Evaluations* (article presented at the American Polygraph Ass'n Seminar, Chicago, Ill. Aug. 4, 1972).

examiner for each physiological indicator; they then were compared against the scoring of the other examiners. An analysis of the data, based upon the comparisons of the judgments of each polygraph examiner, revealed an average correlation of .86. This figure, known as the correlation coefficient, is a mathematical derivation used to ascertain the relationship between any two variables. Plus or minus 1.00 constitutes perfect correlation and 0.00 signifies no relationship at all. Out of 559 cases in which two examiners both reached some decision about the subject's truthfulness, the examiners had agreed 534 times, or an agreement rate of approximately 95.5%.¹²⁷

In another study,¹²⁸ polygraph charts from twenty-five criminal investigations were selected for experimentation. The accuracy of the charts used had been verified by fully corroborated confessions of the guilty subjects. Of the seventy-five examinations administered in those cases, thirty-five were considered dramatically indicative of truth or deception to a fully qualified examiner. The remaining forty, however, presented a serious challenge to even the best polygraphers. To assess an examiner's expertise in this difficult exercise of chart interpretation, the polygraph charts and a summary of the nature of the investigation were submitted to seven experienced examiners and three inexperienced examiners. The examiners were not advised of the age or sex of the subjects, nor did the examiners know where the relevant questions were located on the charts. Results of the study showed that the trio of inexperienced polygraphers attained correct judgement an average of more than seventy-nine percent of the time. The seven examiners who had more than six months experience achieved an average of more than 90 percent correct judgments in the detection of truth and deception. Once again, these results were achieved without the examiner either having met the subject or knowing the exact questions that had been asked.¹²⁹

The increased accuracy of the polygraph technique has led to its widespread use by investigative and law enforcement agencies at all levels of local; state; and federal government, to include the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and the various investigative agencies of the armed forces. The decision as to whether or not to prosecute a particular case frequently is made on the basis of the results of polygraph.¹³⁰

¹²⁷ *Id.*

¹²⁸ Horvath & Reid, *supra* note 25, at 267.

¹²⁹ *Id.*

¹³⁰ See Halbleib, *supra* note 8, at 242.

In any given year, thousands of polygraphs are administered for everything from security checks to employment qualifications. For example, in 1982, the Department of Defense reported conducting 18,301 polygraph examinations; the National Security Agency (NSA) conducted 6700; and other agencies of the federal government conducted 4296 polygraph examinations.¹³¹ The use of the polygraph has become so pervasive in the private sector that Congress drafted the Employee Polygraph Protection Act,¹³² which greatly limited situations in which citizens could be subjected to polygraphs by private employers. One commentator on the Act noted "The fact that the statute exempts the federal government, local governments, and employers that manufacture, distribute, or dispense controlled substances tends to indicate that privacy concerns, not accuracy worries motivated Congress."¹³³ Of course, public acceptance alone should not support a judicial determination of reliability; however, that businesses, the military, government agencies, and others extensively use polygraph examinations should provide some indication that the polygraphy is more than a mere pseudo-science.¹³⁴

Some courts show apparent disdain for polygraph evidence, yet routinely admit as expert testimony arguably less reliable information.¹³⁵ In *United States v. Stifel*,¹³⁶ the court admitted testimony on a revolutionary technique for the analysis of bomb fragments. Although the new technique was criticized by a number of experts as being unreliable, the court upheld the admission stating, "Criticism of the test methods were fully developed before the jury and were appropriate for the body's consideration. Such rebuttal went to the weight of testimony, not to its admissibility."¹³⁷ Another example of notoriously unreliable evidence being admitted¹³⁸ is found in the Supreme Court case of *Barefoot v. Estelle*,¹³⁹ in which the Court upheld the use of psychiatric testimony predicting future dangerousness. This testimony was based on hypothetical questions, vice personal evaluations, of the accused and was used to support the

¹³¹U.S. Congress, Office of Technology Assessment, Scientific Validity of Polygraph Testing: A Review and Evaluation—" Technical Memorandum (1983), reprinted in 12 POLYGRAPH 198, 201 (1983).

¹³²Employee Polygraph Protection Act, Pub. L. No. 100-347, 102 Stat. 646 (1988) (codified at 29 U.S.C. §§ 2001-2009 (1988)).

¹³³Halbleib, *supra* note 8, at 242.

¹³⁴*Id.* at 241.

¹³⁵O'Connor, *supra* at note 44, at 106.

¹³⁶433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 944 (1971).

¹³⁷*Id.* at 438.

¹³⁸O'Connor, *supra* note 44, at 106.

¹³⁹463 U.S. 880 (1983).

imposition of the death penalty. In *Estelle*, the Court noted, "We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings."¹⁴⁰

2. *Military Rule of Evidence 702: Trial Members and the Polygraph.*—The second tier of the MRE 702 balancing test addresses the often-raised concern that polygraph evidence will overwhelm, confuse, or mislead the jury. In other words, the evidence will not be helpful to the factfinders as required by MRE 702. In relation to the "helpful" standard, the courts historically have been concerned that polygraph evidence would be given "undue reliance,"¹⁴¹ thereby usurping the role of the factfinder.

The fear that the member's function will be usurped by the polygraph elicits three responses. First, if a polygraph examination is as accurate as the proponent has proved it to be, it merits heavy reliance in a process whose primary purpose is the search for "truth." Secondly, judicial opinion¹⁴² recognizes that the administration of justice will not collapse with the introduction of polygraph evidence and the system actually well may improve. Members will not become overawed by the polygraph because the examiners adequately can be cross-examined and subjected to judicial scrutiny. The third response is that the concern over the "overwhelming impact" of the polygraph is exaggerated. This exaggerated concern for the jury's response best and most fully was gainsaid by Judge P.J. Gardner.

Too much of the law of evidence has its roots in an era when jurors were ignorant peasants and an elite group (the lawyers and judges) carefully hand fed them such information as they (the elite) felt the peasants could safely absorb. ... It is now the latter portion of the Twentieth Century, and while many, and perhaps most, lawyers and judges still consider themselves as elite corps, any substantial experience on the trial court level should persuade all but the most barnacled encrusted traditionalist that the average juror today enjoys a knowledge, an awareness, a sophistication and in many cases an education comparable to or superior to that of law school graduates. It is high time that lawyers and judges accept the fact that the rest of society is entitled to the respect and consideration of equals. ... Today it

¹⁴⁰*Id.* at 899.

¹⁴¹*Alexander*, 526 F.2d at 165.

¹⁴²*Gipson*, 24 M.J. at 249.

takes a certain effrontery, a certain intellectual snobbery, to say to a juror, 'You cannot hear this evidence because you are not capable of effectively evaluating it.'" Because of a lack of appreciation of the stability and integrity of the jury system, too much emphasis is still being put on the danger of prejudicing the jury by the admission of allegedly improper evidence. Basically, everything helpful to the truthfulness process should be admissible as relevant evidence.¹⁴³

This statement by Judge Gardner has even more meaning in the military justice system, in which a typical panel of members consists of mid-to-senior officers, all of whom are well trained and hold positions of leadership and responsibility.¹⁴⁴ The argument that polygraph evidence may mislead the factfinder has even less merit in military trials that are argued with no members, but instead with the military judge as the trier of fact. Civilian juries also have given indications that they too as a group are not unduly influenced by the admission of polygraph evidence.¹⁴⁵

3. Military Rule Of Evidence 702: Application of the *Polygraph*.—The third part of the helpfulness balancing test, as explained in the *Gipson* case, is a connection between the scientific research or test result to be presented and a particular disputed factual issue in the case.¹⁴⁶ This part of the helpfulness balancing test is really a relevancy standard. In other words, as applied to polygraph evidence, what tendency does the polygraph examiner's testimony have in making the existence of a disputed fact of consequence more or less probable. To use this test, the trial court must identify the disputed fact of consequence to which the polygraph relates.¹⁴⁷ In the *Gipson* case, Judge Cox noted that polygraph evidence is limited to "[w]hether the examinee was being truthful or deceptive at the time of the polygraph exam. It is then for the factfinder to decide whether to draw an inference regarding

¹⁴³*People v Johnson*, 109 Cal. Rptr. 118, 132-34 (32 Cal. Ct. App. 3d. 1973) (Gardner, P.J., dissenting).

¹⁴⁴UCMJ art. 251 (1988). The degree of competence of a military panel is bolstered by Article 25(d)(2), which directs the convening authority to detail members who are qualified for member's duty according to age, education, training, experience, length of service, and judicial temperament.

¹⁴⁵F. Barnett, *How Does a Jury View Polygraph Results?*, 2 J. AM. POLYGRAPH ASS'N, no. 4, at 275-77 (1977). One study analyzed a group of jurors in a larceny case in which the trial court allowed the results of a polygraph into evidence, and an acquittal resulted. Interviewed after the deliberation process, the jurors explained that they had given no additional weight to the polygraph results and had set the polygraph evidence aside, deciding the case without it.

¹⁴⁶*Gipson*, 24 M.J. at 251.

¹⁴⁷O'Connor, *supra* note 44, at 107.

the truthfulness of the examinee's trial testimony".¹⁴⁸ Trying to merge this concept of limited use with the balancing requirement that the factual issue be disputed creates an interesting question. In other words, "How does the credibility at the time of the polygraph exam become a disputed factual issue?"¹⁴⁹

The Gipson court further defined polygraph evidence noting, "While polygraph evidence relates to the credibility of a certain statement, it does not relate to the declarant's character."¹⁵⁰ Clearly the prerequisite for the admission of polygraph evidence is the accused taking the stand,¹⁵¹ but what the Gipson court does not clarify is what event makes the examinee's credibility at the time of the polygraph exam a disputed fact. The court's opinion suggests that the examinee's in court-testimony is enough to create a disputed issue requirement. The same result is achieved by considering the examinee's credibility at the time of the polygraph exam to be disputed automatically once he or she testifies.

4. Conclusion.—Rule 702, as interpreted by the Court of Military Appeals,¹⁵² is an expansive rule of evidence that allows the admission of evidence if it can be helpful to the trier of fact. The balancing test used by the court¹⁵³ ensures that the admitted evidence is reliable, understandable, and relevant. A military jury is a sophisticated group of individuals that is more able to understand and properly use polygraph evidence as it applies to a case than a typical civilian jury. The relevance of the testifying accused's credibility and the possible affect polygraph evidence intentionally may impute are obvious. The Court of Military Appeals addressed the issue of reliability as follows:

The most troublesome aspect of the question of reliability is the wide range of uses which are apparently being made of the polygraph in private business, industry, and the federal government. If the tests are not reliable, why are they being used so heavily? Are they merely some type of "hocus-pocus" used to create an atmosphere which induces the guilty to confess, or do they really provide scientific evidence from which an examiner may ferret out the truth? The greater weight of authority indicates that it can be a helpful scientific tool.¹⁵⁴

¹⁴⁸ *Gipson*, 24 M.J. at 253.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 252.

¹⁵¹ *Id.* at 253; see also *United States v. Abeyta*, 25 M.J. 97, 98 (C.M.A 1987).

¹⁵² See *Gipson*, 24 M.J. at 251.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 249.

Polygraph evidence easily passes muster under the liberal auspices of MRE 702—much more so than some evidence that is admitted routinely.¹⁵⁵ Accordingly, the rule of exclusion encompassed in MRE 707 is a blatant example of statutory incompatibility and inefficiency. In other words, MRE 702 and MRE 707 are opposed diametrically in their treatments of polygraph evidence, which may lead to some confusion among practicing attorneys and military judges.

A recent change to Federal Rules of Evidence 702¹⁵⁶ has been proposed, which could mark a halt to the expansive admissibility trend currently enjoyed by MRE 702. The proposed changes, which may become applicable¹⁵⁷ to the **military**,¹⁵⁸ are as follows:

~~If Testimony providing scientific, technical, or other specialized knowledge information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue,—and (2) the a witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. may testify there to in the form of an opinion or otherwise. . . .159~~

The proposed rule would make using expert testimony more difficult. It accomplishes this by raising the standards for admission and increasing the judicial control in this area.¹⁶⁰ Its effect and adoption in the military are unsettled because these changes, in both character and motivation, were made because of the frivolous use of expert testimony in civil trials.¹⁶¹

B. Rules of Relevance: Military Rules of Evidence 401 thru 403

1. *Military Rules of Evidence 401 and 402.*—Rule 401 defines relevant evidence as "evidence having any tendency to make

¹⁵⁵ See *supra* notes 137-43 and accompanying text.

¹⁵⁶ See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Aug. 1991) [hereinafter PROPOSED AMENDMENTS].

¹⁵⁷ Omitted changes refer to the civil rule contained in Federal Rules of Evidence 702, which is inapplicable to the military.

¹⁵⁸ MCM, *supra* note 3, MIL. R. EVID. 1102, works to incorporate any amendment to the Federal Rules of Evidence automatically into the MRE, absent contrary action by the President. This incorporation is automatic 180 days after the effective date of an amendment.

¹⁵⁹ PROPOSED AMENDMENTS, *supra* note 156, at 83. Underlined material is new and lined-through material is to be omitted from the current rule.

¹⁶⁰ Jack B. Weinstein, Rule 702 of the *F.R.E.* is Sound; It Should *Not* be Amended, 137 F.R.D. 631, 638 (1991).

¹⁶¹ See *id.*

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁶² This is clearly a *de minimis* standard and MRE 401 should be considered more a definitive rule than one of exclusion. Oftentimes this rule is called the rule of “logical relevance.”¹⁶³ Polygraph evidence easily qualifies as evidence probative on the issue of the credibility of the testifying accused, which is always determinative on the ultimate issue.

Rule 402 provides, “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the rules, or by other rules proscribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”¹⁶⁴ Taken together, MREs 401 and 402 form the first of many legal hurdles polygraph evidence would have to overcome to be admitted. To comply with these two rules, polygraph evidence must make the existence of a fact more or less probable. This is a relatively easy standard to meet because polygraph evidence need only detect deception at a rate better than fifty percent.¹⁶⁵ Because most of the studies for the polygraph device show accuracy rates well in excess of this standard, polygraph evidence seems to qualify as relevant evidence under MRE 401 and MRE 402.¹⁶⁶

2. Military Rule of Evidence 403.—Once relevancy is established, a proponent of evidence must take into consideration the balancing test contained in MRE 403.¹⁶⁷ Rule 403 directs the military judge to exclude even relevant evidence, “[i]f its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”¹⁶⁸ The application of MREs 401 thru 403 sometimes has been referred to as a determination of the “legal relevance” of the offered evidence.¹⁶⁹ Of the three relevancy rules, MRE 403 is arguably the most important because it embodies an active rule of exclusion and largely credits judicial discretion in balancing the admission of evidence.¹⁷⁰

¹⁶²MCM, *supra* note 3, MIL. R. EVID. 401.

¹⁶³McCORMICK, *supra* note 115, at 542-43.

¹⁶⁴MCM, *supra* note 3, MIL. R. EVID. 402.

¹⁶⁵See Halbleib, *supra* note 8, at 237.

¹⁶⁶See Horvath & Reid, *supra* note 25, at 237.

¹⁶⁷MCM, *supra* note 3, MIL. R. EVID. 403.

¹⁶⁸*Id.*

¹⁶⁹McCormick, *supra* note 115, at 548.

¹⁷⁰See O'Connor, *supra* note 44, at 110.

An analytical review of the drafter's justification for MRE 707 reveals an overt rejection of a military judge's ability to use MRE 403 accurately. The reasons delineated in the drafter's analysis justifying the promulgation of MRE 707 actually are moot because of the total overlap with the exclusionary power of MRE 403. The prejudicial impact of creating MRE 707 is seen not only in the apparent statutory redundancy, but also in the preclusion of a fact-specific analysis called for under MRE 403.¹⁷¹ By precluding any judicial analysis or, more precisely, by doing an analysis without referral to particular facts, MRE 707 directly contradicts the judicial philosophy inherent in MREs 401 thru 403. This philosophy stands for the proposition that a proponent of potentially relevant evidence has the right to have his or her evidence undergo a fact-specific, case-specific, review by the military judge. Consequently, the issue is whether polygraph evidence would pass judicial review under MRE 403 in a fact-specific, case-specific setting.

(a) Military Rule of Evidence 403: Confusion of *the* Issues.—Confusion of the issues historically has been one of the main concerns in admitting polygraph evidence.¹⁷² It is one of the reasons cited by the drafters in their justification for the bright-line rule of exclusion in MRE 707. The argument advanced by the drafters is that the trier of fact will lose its focus on the guilt or innocence of the accused and concentrate on the validity and weight to be afforded the polygraph evidence.¹⁷³ Supposedly, the polygraph becomes the focus of the trial as psychologist, polygraph examiners, and physicians will come forth to praise or condemn, leaving behind the issue of guilt or innocence. The fallacy in the drafters' objections lie in distinguishing polygraph evidence from other types of testimony developed from experts. Ignoring the inequity of singling out polygraph evidence, the drafters failed to recognize that the adversarial process is not the best approach in resolving intellectual disputes in the scientific arena.¹⁷⁴ As to the resolution of scientific disputes in the courtroom, Judge Learned Hand wrote the following:

¹⁷¹See Halbleib, *supra* note 8, at 237.

¹⁷²In *United States v. McKinnie*, 29 M.J. 825 (A.C.M.R. 1989), *aff'd*, 32 M.J. 141 (C.M.A. 1991), the accused was charged with fraternization and subjected himself to an *ex parte* polygraph that resulted in a finding of no deception. The trial judge excluded the evidence after applying the balancing test enumerated in MRE 403. Specifically, the trial judge was concerned with the lack of reliability in a *ex parte* exam. He further declined to force the trial counsel to stipulate to a second exam, fearing the likelihood of misleading the members with multiple exams. The Army Court of Review found **no** abuse of discretion and affirmed the conviction.

¹⁷³See Halbleib, *supra* note 8, at 238.

¹⁷⁴*Id.*

The result is that the ordinary means successful to aid the jury in getting at the facts, aid, instead of that, in confusing them. . . . The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.¹⁷⁵

If confusion of the issues is inherent in the particular field, it will be excluded by a case-specific, fact-specific analysis. Expert testimony, by its very nature, tends to invite confusion of the issues. To inject selective, wholesale exclusion in this area invites inequities that may hinder a resolution of helpful issues.

(b) *Military Rule of Evidence 403: Misleading the Members.*—Another aspect of polygraph evidence that has been used to justify MRE 707 is the danger of misleading the members. The expressed concern of the drafters is that the members will be overwhelmed and will tend to put undue weight on the polygraph evidence. This danger is not particular to the polygraph. The danger that the members will be overwhelmed by any type of expert testimony is ever present in our adversarial system. Because probative value is based on the degree to which the evidence establishes a fact,¹⁷⁶ the reliability of the evidence largely ascertains its probative value.¹⁷⁷ The reliability of any expert testimony is established by laying the proper foundation in areas such as experience, technique, education, and accomplishments. Once the foundation is laid, the court is able to ascertain the level of reliability and thereby establish the resulting probative value. If the expert's credentials are accepted, reliability may be inferred, and the trier of fact will put great weight in the evidence. Arguably, the term "undue weight" has no place in the adversarial system in relation to proposed expert testimony. The goal of the advocate is to persuade the trier of fact to believe in, accept, and trust his or her position. The proponent of evidence wants to maximize the level of "undue weight" as it relates to the offered evidence. Judicial instructions, cross-examination, pretrial motions in limine, and the discovery process are part of the

¹⁷⁵*Id.* (citing Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 53-54 (1902)).

¹⁷⁶MCM, *supra* note 3, MIL. R. EVID. 401.

¹⁷⁷*See* O'Connor, *supra* note 44, at 114.

checks and balances that maintain a sense of “legal equilibrium.” No scientific or pseudo-scientific data stands for the proposition that polygraph evidence has the ability adversely to control the deliberation process more than other routinely admitted types of expert testimony.¹⁷⁸ To create a bright-line rule of exclusion that precludes the presenting of foundational matters—thus negating any chance to establish reliability for polygraph evidence—is disproportionate to the goal allegedly served. Therefore, justifying the creation of MRE 707 because of an apparent lack of proven reliability surrounding the polygraph device is an example of flawed logic.

(c) *Military Rule of Evidence 403: Considerations of Undue Delay.*—As highlighted in MRE 403, the concern is whether polygraph evidence would lead to, “consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”¹⁷⁹ Litigating the polygraph issue can be time consuming. Like any other type of expert testimony, how much time is used will relate directly to the quality of the counsel, the availability of experts, and the facts specific to that case. If time considerations were of such paramount importance, the military courts might never see a urinalysis case overseas again. The potential for lengthy motion practice is certainly present in affording both sides a full opportunity to develop the law in this area. To achieve a just resolution in many cases, delays may be both justified and mandated. But how much time is too much? The answer to this question is found in both case law and already established rules of evidence.

An interesting rule of evidence, rarely cited, is MRE 102.¹⁸⁰ The lack of citations indicates that this is a rule of reason, rather than exclusion. Rule 102 defines the philosophy and goals inherent in the rules of evidence and states the following “these rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹⁸¹

This rule is often used by the courts as a reminder that the law must remain flexible and that blind, rigid adherence to inelastic concepts may preclude the truth from being discovered

¹⁷⁸ Halbleib, *supra* note 8, at 141.

¹⁷⁹ MCM, *supra* note 3, MIL. R. EVID. 403.

¹⁸⁰ *Id.* MIL. R. EVID. 102.

¹⁸¹ *Id.*

and proceedings from becoming determined justly.¹⁸² In *United States v. Jones*,¹⁸³ the Army court summed up its position on MRE 102 by stating, "While MRE 102 does not constitute a license to substitute judicial predilection for the specific dictates of the President, it does clearly establish a desire for flexibility and new approaches in the interpretations of the rules."¹⁸⁴ The common theme raised in the various courts' interpretation of MRE 102 are developing the law and ascertaining the truth. Time consumed in a professional manner in pursuit of these goals should not be labeled as unjustifiable delay. The philosophy inherent in the MREs as a whole supports the acceptance of inherent delays in deciding polygraph issues as a reasonable means to a justified end.

Excluding relevant evidence or the possibility of admission because of a potential waste of time easily can become a judicial abuse of discretion. Nevertheless, this seems to be the direct result of the implementation of MRE 707. By its very existence, MRE 707 seems to accomplish that which arguably would be defined as an abuse of discretion if done by a military judge. In *United States v. Allen*,¹⁸⁵ the Navy-Marine Corps Court of Military Review warned that "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay may result in a violation of an accused right to the assistance of counsel."¹⁸⁶ A review of the case law¹⁸⁷ indicates that when a delay is requested, "a military judge should exercise caution before denying a continuance if in doing so, one of the parties may be denied essential evidence."¹⁸⁸ The Fifth Circuit

¹⁸² See *United States v. Hines*, 18 M.J. 722 (A.F.C.M.R. 1984). The *Hines* court referred to MRE 102 in analyzing whether evidence had equivalent circumstantial guarantees of trustworthiness under MRE 804(b)(5); see also *United States v. Smith*, 30 M.J. 1022 (A.F.C.M.R. 1990). In *Smith*, the Air Force Court of Military Review used MRE 102 in its evaluation of evidence which was potentially inadmissible under the marital communication privilege, which is contained in MRE 504. The court concluded that evidence adduced at trial concerning a conspiracy to defraud the trial court properly was admitted and not protected under MRE 504.

¹⁸³ 19 M.J. 961 (A.C.M.R. 1985).

¹⁸⁴ *Id.* at 967.

¹⁸⁵ 31 M.J. 572 (N.M.C.M.R. 1990).

¹⁸⁶ *Id.* at 620 (citing *United States v. Thomas*, 22 M.J. 57, 59 (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12, (1982))).

¹⁸⁷ See *United States v. Dinks*, 1 M.J. 254 (C.M.A. 1976); *United States v. Perry*, 14 M.J. 856 (A.C.M.R. 1982), *pet. denied* 16 M.J. 135 (C.M.A. 1983); *United States v. Keys*, 29 M.J. 920 (A.C.M.R. 1989).

¹⁸⁸ *Allen*, 31 M.J. at 620 (citing *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985)). In *Browers*, the Court of Military Appeals reaffirmed that a military judge should exercise caution before denying a continuance if the result would be to deprive a party of an essential witness.

Court of Appeals¹⁸⁹ recognized the need to preserve an accused's rights, even in the face of potentially lengthy delays. The court stated the following:

A scheduled trial date never becomes such an overarching end that it results in the erosion of the defendant's right to a fair trial. If forcing a defendant to an early trial date substantially impairs his ability to effectively present evidence to rebut the prosecution's case or to establish defenses, then pursuit of the goal of expeditiousness is far more detrimental to our common purpose in the criminal justice system than the delay of a few days or weeks that may be sought.¹⁹⁰

Because the heart of the accused's case is often the credibility of the defendant, polygraph evidence very easily can be characterized as essential evidence. Accordingly, to the extent that MRE 707 is born out of fear that too much time may be expended resolving essential issues, that rule is inherently defective.

3. Conclusion.—Prior to the creation of MRE 707, an opponent of the polygraph could feel very confident of ultimately prevailing in the exclusion of polygraph evidence. Judicial application of the rules of relevancy usually resulted in the exclusion of polygraph evidence.¹⁹¹ The rules in place prior to the creation of MRE 707 effectively precluded the confusion and prejudicial effects most feared by the detractors of the polygraph. This was done by a fact-specific, case-by-case analysis that reviewed the reliability and professional characteristics inherent in the evidence offered. If the evidence offered failed to meet either the relevance definition under MRE 401 or the balancing test under MRE 403, it was excluded.

The flaw in MRE 707 is its assumption that polygraph evidence always will fall short in a MRE 403 balancing test. Studies have shown consistently that polygraph evidence does not overwhelm or confuse the members to an extent that justifies a rule of exclusion. The philosophy inherent in the evidentiary rules and the supporting case law, point to a judicial emphasis on developing the law while ascertaining the truth. The speedy disposition of cases is of secondary importance and, if unduly emphasized, may hinder an individual's rights. Rule 403 long has been employed to provide an opportunity for the proponent of evidence to establish legal relevancy, while giving the court an

¹⁸⁹United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976).

¹⁹⁰*Id.* at 1291.

¹⁹¹See *supra* notes 58-61 and accompanying text.

enforcement mechanism to exclude evidence not properly admitted. By not permitting a proponent of polygraph evidence an opportunity to lay the foundation for legal relevance, MRE 707 evades the checks and balances found in MRE 403. Rule 707 adds nothing to the MREs because it is simply an exclusionary rule containing a ban that already had existed.

C. Impeachment, Corroboration, and Military Rule of Evidence 608

Viewed in its totality, MRE 707 stands for the proposition that polygraph evidence is inappropriate for admission in a military court of law. To rebut this proposition, the legal characterization and use of polygraph evidence should be discussed. The Court of Military Appeals in the *Gipson* decision refused to equate polygraph evidence with character evidence. The court went on to elaborate in some detail as to how, with this characterization, polygraph evidence related to MRE 608.

.... We reject the government's alternate contention that Mil.R.Evid. 608(a)(2) and (b) bar the use of polygraph evidence. Mil.R.Evid. 608(a)(2) allows admission of "evidence of truthful character ... only after the character for truthfulness has been attacked." As the government points out, appellant's character was not attacked. However, since the rule addresses character evidence, and polygraph evidence is not character evidence, the rule is inapposite. A like result disposes of the government's Mil.R.Evid. 608(b) argument. That rule generally prohibits use of "extrinsic evidence," "other than conviction of crime," to prove "specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness." Evidence of such conduct (usually misconduct) is adduced for the inference that might be drawn about the witness' character for credibility. Again, since polygraph results do not reveal character, they are not barred by this rule.¹⁹²

With this position, taken by the Court of Military Appeals, issues such as whether the polygraph exam could be considered a specific instance of conduct under MRE 608(b), or whether a day-long exam qualifies an expert to render an opinion on character for truthfulness, are mooted.

The polygraph examiner can testify only as to his or her opinion on whether the examinee was being truthful or deceptive

¹⁹²*Gipson*, 24 M.J. at 252-53.

at the time of the polygraph; and only from this testimony can the factfinder draw any inference of credibility.¹⁹³ Obviously, the Court of Military Appeals mandates, as a prerequisite to the admission of polygraph evidence, that the examinee testify at trial. Without the testimony of the examinee, the polygraph evidence would have no relevant basis for admission.¹⁹⁴ In writing for the court in *Gipson*, Judge Cox recognized the effect of polygraph evidence would be an inference of credibility (or lack thereof), but also conceded, “theoretically, it is conceivable that an expert’s opinion about the truthfulness of a statement made during a polygraph exam could even support a direct inference as to guilt or innocence.”¹⁹⁵ Herein lies the true danger of polygraph evidence.¹⁹⁶ The mode of the expert’s testimony will affect the prejudicial impact on the trier of fact directly. If the expert is allowed to testify on the “relevant control questions” he or she asked and the examinee’s responses, the specific structure of the questions well may support a direct inference as to the guilt or innocence of the accused. Consider an example in which the examinee is an accused, facing various charges of child abuse, and the examiner testifies at trial as follows:

Defense lawyer’s question: “What question did you utilize during the examination?”

Polygraph examiner: “I asked the following, ‘Did you ever put your penis in A’s vagina?’”

Defense lawyer’s question: “What was the accused’s response?”

Polygraph examiner: “The examinee answered, ‘no.’”

Defense lawyer’s question: “Do you have an opinion as to the diagnosis of that response?”

Polygraph examiner: “In my opinion, the accused was nondeceptive in his response.”

Even assuming the testimony is not being offered for the truth of the matter asserted, but as a basis for the polygrapher’s expert opinion as to the outcome of the exam,¹⁹⁷ the testimony nevertheless comes close to answering the ultimate issue of the

¹⁹³*Id.*

¹⁹⁴*Id.* at 253.

¹⁹⁵*Id.*

¹⁹⁶*See id.*

¹⁹⁷*MCM, supra* note 3, MIL. R. EVID. 703, 801(c). The hypothetical questions would be allowed into evidence under MRE 703 as a basis for the expert’s opinion. While admissible for this purpose—and not for the truth of the matter asserted—the testimony would not be hearsay under MRE 801(c).

case. The court in *Gipson* cited this danger as another reason to insist on the examinee's testimony as a prerequisite to the admission of polygraph evidence. Without in-court testimony, "[t]he conclusions of the expert concerning the credibility of the declarant would be the only evidence presented to the fact-finder. In this circumstance, we really would be concerned about usurpation of the factfinder's role."¹⁹⁸

Judge Cox is overly optimistic as to the protective effect of insisting on the in-court testimony of the examinee prior to the admittance of polygraph evidence. Even in that scenario, the danger of the factfinder's role being usurped is present. When a correctly instructed military panel receives a balanced presentation of the facts—though it may not surrender its factfinding role—the potential for subliminal effect is present. The most persuasive justification for MRE 707 is that the members simply will use polygraph evidence as substantive evidence on the ultimate issue. To avoid this hypothetical harm, the drafters have opted for the extreme of a bright-line rule of exclusion—a remedy that vastly surpasses the harm it was intended to cure. Polygraph evidence is simply a tool used to draw an inference on the credibility of a testifying witness. Any greater use of such evidence will justify the fears surrounding the use of the polygraph. The question therefore becomes, "How does the court ensure a proper use of polygraph evidence without instituting a complete bar to admittance?"

The means to ensure the proper use of polygraph evidence is to circumscribe the extent of the testimony presented.¹⁹⁹ The proponent of the polygraph should be limited in the foundational information presented by the expert to the factfinder. Instead of a fact-specific rendition of the relevant control questions, the trial court should allow only generalized information, specific enough to avoid confusion. For example:

Defense lawyer's question: "What questions did you utilize during the examination?"

Polygraph examiner: ("Questions were put to *B* that related to possible acts of misconduct.")

Defense lawyer's question: "What were the *B*'s responses?"

¹⁹⁸ *Gipson*, 24 M.J. at 253.

¹⁹⁹ See *United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989). The court reversed the conviction of the accused because the trial judge allowed in the specific questions asked, and the answers elicited, during a polygraph examination. The court reasoned that the specificity of the information unduly prejudiced the accused.

Polygraph examiner: "In my opinion the examinee's answers reflected a denial of any misconduct."

Defense lawyer's question: "Do you have an opinion as to the diagnosis of the responses?"

Polygraph examiner: "In my opinion, the accused was non-deceptive in his responses."

The above responses are vague, but the danger that the factfinder will go beyond the arguably permissive inference of credibility is minimized.²⁰⁰ Polygraph testing also could go to the trier of fact in the form of a stipulation,²⁰¹ giving even greater control to the military judge. Limiting the proponent to only generalized information still would allow the opponent to attack the weight of the evidence by asking specific questions on cross-examination. This may be a questionable tactic because it would permit on cross-examination, or arguably re-direct, the admission of the information one sought to exclude by using vague questions.

The danger of polygraph evidence being misused is much greater when the examinee is the accused than when the examinee is a mere witness. The issue of guilt or innocence always is lurking beyond the inference of credibility as to the accused. If the examinee is merely a witness, any adverse or positive evidence resulting from a polygraph go more readily to the weight of the evidence than to the ultimate issue.²⁰² An alternative to **MRE 707** would be a partial rule of exclusion, by which only polygraph examinations administered to the accused would be admissible.²⁰³ Though the impeachment or corroboration of witnesses is often an important aspect of a trial, a steady flow of multiple examinations could result in an unreasonable delay in the trial. A vast amount of confusing, collateral, and cumulative material well could justify a rule prohibiting the polygraph examinations of all but the accused and possibly the victim.

Through the guidance set forth in *Gipson*,²⁰⁴ the issues and rules surrounding character evidence are inapplicable when discussing polygraph evidence. Because **MRE 608** does not apply to polygraph evidence, it cannot be used as a basis to preclude it.²⁰⁵ The use of the polygraph is limited to the areas of

²⁰⁰See *id.* at 1262.

²⁰¹See *infra* Part V.D.

²⁰²See Wittman, *supra* note 50, at 13.

²⁰³See Halbleib, *supra* note 8, at 264.

²⁰⁴*Gipson*, 24 M.J. at 252.

²⁰⁵*Id.*

impeachment and corroboration through an inference concerning credibility. This evidence can be highly effective if regulated through a carefully controlled direct examination, or by means of stipulation. A knowledgeable understanding of the character of polygraph evidence and its properly controlled use highlight the lack of a need for a bright-line rule of exclusion.

D. Rule For Courts-Martial 811: Stipulations

Unlike the military, a number of jurisdictions apply per se rules of exclusions to polygraph evidence but allow an exception when the parties stipulate.²⁰⁶ This exception facilitates a workable and reasonable approach to the polygraph dilemma. The stipulation approach “[allows the trial court discretion to admit the evidence if the parties stipulate to the admissibility, scope, and use of the results prior to the administration of the examination.”²⁰⁷ In *United States v. Piccinonna*, the court detailed the following criteria for the use of stipulated polygraph evidence:

Polygraph expert testimony will be admissible in this circuit when both parties stipulate in advance as to the circumstances of the test and as to the scope of its admissibility. The stipulation as to circumstances must indicate that the parties agree on material matters such as the manner in which the test is conducted, the nature of the questions asked, and the identity of the examiner administering the test. The stipulation as to scope of admissibility must indicate the purpose or purposes for which the evidence will be introduced. When the parties agree to both of these conditions in advance of the polygraph test, evidence of the test results is admissible.²⁰⁸

A number of advantages are gained through the stipulation process. These advantages, in turn, display the inequities of a bright-line exclusion of all polygraph evidence. By having a procedural guide for stipulated polygraph results, a court can anticipate and overcome the various problems associated with polygraph evidence. One of the main advantages gained by listing the various factors to be agreed upon is avoiding any “so-called” battle of experts.²⁰⁹ This is accomplished by agreeing on the

²⁰⁶ See, e.g., *McMorris v. Israel*, 643 F.2d 458, 459-60 (7th Cir. 1981), cert. denied, 455 U.S. 967 (1982); *United States v. Oliver* 525 F.2d 731, 736-37 (8th Cir. 1975), cert. denied, 424 U.S. 973 (1976).

²⁰⁷ Halbleib, *supra* note 8, at 251.

²⁰⁸ *United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989).

²⁰⁹ See Brennan, *supra* note 13, at 155.

testing procedure, the nature of the questions, and the identity of the examiner. This particular process—by getting the parties to agree among themselves and resolve routine objections—can alleviate most of the traditional fears associated with polygraph evidence, such as confusion of the issues and the waste of time.

Another case describing the stipulation process is *United States v. Oliver*,²¹⁰ in which the accused was charged and found guilty of interstate transportation of a woman for sexual gratification. The defenses's contention at trial was that the transportation and sex acts were consensual.²¹¹ At a pretrial hearing, the defendant advised the trial court that, at his own expense, he had taken a polygraph examination that had resulted in a finding of no deception to the relevant questions. The defendant then offered to submit to yet another polygraph, stipulating to its admissibility even if the results were unfavorable.²¹² The Government subsequently agreed to stipulate and the trial court went through a lengthy voir dire of the accused,²¹³ ensuring a knowledgeable waiver of any future objection. Subsequently, the accused failed the polygraph exam and it was used against him at trial. The defendant then moved to admit the results of the previously unstipulated polygraph, but the court refused to admit it. The Eighth Circuit Court of Appeals held that the accused had made a knowing waiver of his rights against self-incrimination and that the trial court had ruled correctly in admitting the stipulated exam, while excluding the unstipulated exam.²¹⁴

Although the presence of contradictory polygraph results in the same case might seem to denigrate the reliability of the polygraph, the case's importance lies in the validation of the use of stipulations. By requiring both sides to stipulate to the admissibility of the exam, the incentive to find objective, qualified professionals is created. Neither side will agree to an expert who demonstrates partiality to either party; therefore, the process encourages a high degree of quality. The logical result of such a process should be a polygraph exam with a higher degree of trustworthiness.²¹⁵

This is exactly what occurred in the *Oliver* case. The trial court's exclusion of the first exam was not so much based on the fact that it was ex parte, as it was on the apparently haphazard

²¹⁰525 F.2d 731 (8th Cir. 1975), cert. denied, 429 U.S. 973 (1976).

²¹¹*Id.* at 733.

²¹²*Id.* at 734.

²¹³See *Id.* at 735 n.5 (presenting transcript of the highly detailed voir dire).

²¹⁴*Id.* at 736-38.

²¹⁵See Halbleib, *supra* note 8, at 252.

procedures used. The first examiner had questionable qualifications, was not informed fully of the specifics of the case, and used nonspecific relevant control questions. Presumably, these limitations would have precluded the Government from stipulating to the first exam. The stipulated exam was run by a highly qualified expert who was informed fully about the nuances of the case, and who used generally accepted procedures in administering the exam. The accused attacked this second exam only after an adverse result was achieved. The accused's motion to exclude the second exam was based on possible bias of the examiner and a violation of Fifth Amendment rights—not the inherent unreliability of the process.²¹⁶

The stipulation method of admitting polygraph evidence is an effective tool of the trial bench that highlights how unnecessary a per se rule of exclusion is. By agreeing in advance to the admissibility of the results, the stipulation process ensures both sides will use objective and qualified examiners who will provide trustworthy evidence. An agreement on exam procedures avoids any evidentiary battle between conflicting experts. This would save time and avoid confusion, which often results from contrary opinions among experts.

The stipulation process long has been favored by the courts because of the ease of judicial control.²¹⁷ A military judge has the discretion to exclude a stipulation from being admitted into evidence if it appears to be unclear or confusing.²¹⁸ Further, a military judge may decline to accept a stipulation into evidence in furtherance of the interests of justice.²¹⁹ An additional control inherent in the stipulation process is the ability of one party simply to refuse to enter into a stipulation, or to make a timely withdrawal.²²⁰ These rights are consistent with the Court Of Military Appeals' opinion that "there is no independent constitutional right to present favorable polygraph evidence."²²¹ Finally, even if both sides agree to a stipulation, the stipulation itself must pass muster in the area of relevancy.²²² If this were not the

²¹⁶*Oliver*, 525 F.2d at 737-38. At trial, the defense's attack of the second polygraph was based on the examiner being both biased and predisposed to finding the accused deceptive. The accused's Fifth Amendment argument alleged that the judge had coerced him into agreeing to the second polygraph at a pretrial hearing. The Eighth Circuit Court of Appeals disagreed, and the case was affirmed.

²¹⁷MCM, *supra* note 3, R.C.M. 811(b).

²¹⁸*Id.*

²¹⁹*Id.*

²²⁰*Id.* R.C.M. 811(c), (d).

²²¹*Gipson*, 24 M.J. at 252.

²²²MCM, *supra* note 3, MIL. R. EVID. 401, 403.

case, both sides arguably could agree to a stipulation concerning voodoo and have it admitted.

The stipulation approach is not perfect. The constitutional infirmities suggested by *Chambers v. Mississippi* and *Rock v. Arkansas*²²³ are not cured by the stipulation. If a party has a constitutional right to offer this sort of testimony, no justification will support limiting the right to stipulations contingent upon the prosecutor's agreement. A party either has a right that exists in all situations or has no right.²²⁴ Therefore, because of the possibility that the trial counsel will refuse to stipulate, a constitutional dilemma remains which presents itself with rules of total exclusion such as MRE 707. The other limitation in the stipulation process is that the issue of reliability still may be unresolved. In other words, the parties still may disagree over how reliable the evidence must be before the military judge will accept the stipulation into evidence. The adversarial process, however, should ensure that only reliable evidence would be amenable to both sides in the creation of a stipulation.

The stipulation process ensures reliable, trustworthy evidence that saves time, avoids confusion, and maintains judicial control. Rule 707's exclusionary rule ensures only that trustworthy evidence produced by the stipulation process never reaches the factfinder.

E. Military Rule of Evidence 412: Rape Shield

Rule 707 is somewhat unique among the MREs because it is the only rule that adversely affects an accused's rights without any possible exception to its per se rule of exclusion. The so-called rules of exclusion, MREs 407 thru 411, exclude various forms of information,²²⁵ but usually to the benefit of the accused. The closest thing to a per se rule of exclusion that works adversely to the rights of the accused is MRE 412.²²⁶ This rule addresses two distinct forms of evidence, specific instances of conduct, and opinion and reputation evidence. Rule 412 contains a bright-line rule of exclusion as to opinion and reputation evidence relating to the past sexual behavior of the victim.²²⁷ No exception to this

²²³ See *supra* notes 77-97 and accompanying text.

²²⁴ See Halbleib, *supra* note 8, at 253.

²²⁵ MCM, *supra* note 3, MIL. R. EVID. 407-411. The rights of the accused under these rules include the ability to prevent the Government from offering into evidence a number of things. Evidence of an offer to compromise, remedial measures, plea discussions, and the payment of medical expenses are inadmissible.

²²⁶ *Id.* MIL. R. EVID. 412.

²²⁷ *Id.* MIL. R. EVID. 412(a).

aspect of the rule exists because this type of attack on a rape victim's sexual history often results in evidence of doubtful probative value and injection of irrelevant collateral issues.²²⁸ For the same reason, the rule also contains a per se rule of exclusion dealing with specific conduct of the victim's past sexual behavior.²²⁹ The rule, however, contains three exceptions that allow for the admission of factual evidence on the victim's past sexual behavior. The first two exceptions are specific to nonconsensual sexual offenses because they allow for evidence to be presented concerning three issues: source of semen, injury to the victim, and consent. These two exceptions have little or no value in a discussion of MRE 707, except that they evidence an unwillingness by the drafters to foreclose completely the admission of exculpatory evidence in this area. The third exception bears analysis because it calls for the admission of evidence of the victim's past sexual behavior if a court determines that the Constitution requires its admittance.²³⁰ All three exceptions are based on the concept of relevance outweighing the danger of unfair prejudice to the victim.²³¹ Rule 412 seems to recognize the potential for constitutional issues arising in a rule containing a per se rule of exclusion. This begs the question of why the potential for constitutionally required evidence is required under MRE 412, but not MRE 707.

In trying to define "constitutionally required" as it relates to Federal Rule of Evidence 412,²³² the Tenth Circuit Court of Appeals, in *United States v. Begay*,²³³ stated the following:

Although the Rule provides no guidance as to the meaning of the phrase "constitutionally required," it seems clear that the Constitution requires that a criminal defendant be given the opportunity to present evidence that is relevant, material, and favorable to his defense.²³⁴

Some earlier decisions merit discussions in further defining the necessity of "constitutionally required."

²²⁸ See *Privacy for Rape Victims: Hearings on H.R. 14666 and other Bills Before the Subcommittee on Criminal Justice of the Committee on the Judiciary*, 94th Cong., 2d Sess. (1966).

²²⁹ MCM, *supra* note 3, MIL. R. EVID. 412(b).

²³⁰ *Id.* MIL. R. EVID. 412(b)(1).

²³¹ *United States v. Merrival*, 600 F.2d 717 (8th Cir. 1979).

²³² Federal Rule of Evidence 412 is substantially the same rule as its military counterpart, with minor differences in its scope of application and procedural requirements.

²³³ *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991).

²³⁴ *Id.* at 523 (quoting *United States v. Saunders*, 736 F. Supp. 698, 703 (E.D. Va. 1990)).

In *United States v. Dorsey*,²³⁵ the accused raised the defense of consent to a rape charge. The Government's evidence showed that the victim had fled the scene of the rape in a tearful and emotional state and, within a short period of time, had reported the rape to various friends and authorities.²³⁶ The defendant attempted to explain the young girl's emotional state by testifying that she had had sex with his friend earlier that evening and when she proposed to have sex with the accused, he had called her a whore. Upon hearing this, she had burst into tears and left. The accused tried to offer the testimony of the victim's earlier sexual activity, but the trial judge excluded the evidence under MRE 412. The Court of Military Appeals disagreed, holding that the evidence constitutionally was required because it was being offered to corroborate the accused's explanation of some of the most damaging information against him—specifically, the emotional state of the victim.²³⁷

In *United States v. Colon-Angueira*,²³⁸ the accused also was charged with rape and attempted to admit evidence that prior to the charged incident, the victim's husband had been unfaithful, and that the infidelity had caused the victim to be upset and angry. The defense also tried to admit evidence that the victim had had sex with two other men following the alleged rape. The defense's theory of admissibility was that, at the time of the offense, the victim had a hostile state of mind toward her husband which probably motivated or impelled her to have consensual sex with the accused. The military judge excluded the evidence pursuant to MRE 412, and the Court of Military Appeals reversed, holding that the excluded evidence was relevant, material, and constitutionally required.²³⁹ The court stated, "As a rule of relevance, MRE 412 must not be applied mechanically by military judges. Otherwise, a trespass will occur against the Sixth Amendment rights of the accused. ..." ²⁴⁰

In *United States v. Jensen*,²⁴¹ the accused was charged with raping a foreign national while he was stationed in South Korea. The evidence showed that the accused and a friend had met the victim on a street corner; the accused's friend soon thereafter went into the alley with the victim and had intercourse. The accused then took the victim into the alley and also had

²³⁵ 16 M.J. 1 (C.M.A. 1983).

²³⁶ *Id.* at 3.

²³⁷ *Id.* at 2-7.

²³⁸ 16 M.J. 20 (C.M.A. 1983).

²³⁹ *Id.* at 22-27.

²⁴⁰ *Id.* at 30.

²⁴¹ 25 M.J. 284 (C.M.A. 1987).

intercourse with her, which constituted the basis for the charge. At trial, the accused insisted that both he and his friend had consensual intercourse with the victim. The trial judge excluded the testimony of the friend, who was prepared to testify that his intercourse with the victim was consensual. The Court of Military Appeals reversed, holding that the excluded evidence constitutionally was required to be admitted and this failure denied the accused his Sixth Amendment right to confront his accuser.²⁴²

The common thread running through these and other cases²⁴³ appears to be that evidence of specific acts of the victim will constitutionally be required if the defense can establish a legal relevancy to the Fifth and Sixth Amendment rights of the accused. The drafters' analysis²⁴⁴ states that the rule recognizes the "fundamental right of the defense under the Fifth Amendment of the Constitution of the United States" to present relevant evidence.²⁴⁵ The analysis goes on to say that MRE 412 never was intended to be a rule of absolute privilege, and evidence "that is constitutionally required to be admitted on behalf of the defendant remains admissible notwithstanding the absence of express authorization in MRE 412(a)."²⁴⁶

The willingness to analyze past sexual behavior of a rape victim in MRE 412 by employing a required constitutionally exception, is inconsistent with the bright-line rule of MRE 707. If the polygraph evidence being offered has any tendency to suggest that the proponent can meet the requirements of relevancy and materiality, while showing it to be favorable to the defense, it well may be constitutionally required.²⁴⁷ The bright-line rule of exclusion encompassed in **MRE 707** suggests possible constitutional infirmity when compared to **MRE 412**.

VI. The Polygraph and Special Circumstances

The two maxims of any great man at court are, always to keep his countenance, and never to keep his word.²⁴⁸

One of the quandaries MRE 707 creates becomes apparent when reviewing the rule as a whole. Military Rule of Evidence

²⁴²*Id.* at 285-89.

²⁴³*See United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983).

²⁴⁴MCM, *supra* note 3, MIL. R. EVID. 412 analysis, app. 22, at A22-34.

²⁴⁵*Id.*

²⁴⁶*Id.*

²⁴⁷*See United States v. Hicks*, 24 M.J. 3, 10 (C.M.A. 1987), *cert. denied*, 484 U.S. 827 (1987).

²⁴⁸Jonathan Swift, *Thoughts on Various Subjects*, reprinted in *DICTIONARY OF QUOTATIONS*, *supra* note 72, at 178.

707(A) categorically excludes all evidence relating to the polygraph. This would seem to foreclose judicial acceptance of even an offer of proof or motion for admission. Nevertheless, MRE 707(B) provides that statements obtained during an examination, which are otherwise admissible, shall not be excluded from admission. The drafters realized that, MRE 707 notwithstanding, the polygraph remains a widely used investigative tool. The rule fails to mention, however, the solution to various scenarios whereby statements and facts intertwined in the examination are admissible, but any reference to the polygraph is not. The result of this ambiguity tends to create inequities for both the Government and the accused.

In *Tyler v. United States*,²⁴⁹ the accused was charged with first degree murder, subsequently apprehended, and brought in for questioning. The police suggested that he submit to a polygraph examination. He agreed and was given a polygraph, with the results indicating deception. When told of the result, the accused confessed to the murder. At trial, the accused claimed his confession was coerced, causing the prosecutor to offer into evidence the accused's confession after failing the polygraph.²⁵⁰ The trial court allowed in evidence of the polygraph for the limited purpose of deciding whether the confession was voluntary. The trial judge gave instructions to the jury accordingly. The appellate court agreed.

This court has held the results of a lie detector test to be inadmissible. [citation omitted] We do not mean to impair the ruling. But here the circumstances are different. The evidence had a material bearing upon the conditions leading to Tyler's confession and was relevant upon the vital question as to whether the same was voluntary. With the court's clear and positive instruction to the jury, holding the evidence within the presumption that the instruction was followed by the jury, we are not warranted in assuming that any prejudicial results followed from the incident.²⁵¹

The bright-line rule contained in MRE 707 would preclude the above limited use of the polygraph evidence, even though it was clearly relevant on the question of voluntariness. Ironically the impetus behind the exclusionary aspects of MRE 707 is the alleged lack of reliability inherent in the polygraph machine. Nevertheless, the issue of reliability in a *Tyler* situation is

²⁴⁹ 193 F.2d 24 (D.C. Cir. 1951), cert. denied, 343 U.S. 908 (1952).

²⁵⁰ *Id.* at 25-28.

²⁵¹ *Id.* at 31.

immaterial, because the only relevant evidence is the accused's subjective perceptions and how they relate to the issue of voluntariness.²⁵² In a *Tyler* scenario, MRE 707 could have the effect of preventing disclosure and consideration of highly relevant evidence on a key issue. If the authorities used the polygraph in a deceitful manner to trick the accused but not affect the voluntariness,²⁵³ ordinarily the defense still could attack the weight of the confession by explaining how it had been achieved.²⁵⁴ Accordingly, MRE 707 seems to prevent a defense counsel from using a tactic that expressly is authorized under MRE 304(e)(2).²⁵⁵ In this situation, the Government seems to have an inequitable advantage as a result of a rule that is suppose to be nonpartisan.²⁵⁶ The defense is not the only side that may be prejudiced by the rule.

Change the facts slightly in a case in which the voluntary aspects of a statement are being challenged and the Government could be prejudiced unfairly. For example, assume an accused is brought down to the Naval Investigative Service (NIS) office at 0800 for questioning. The accused is read his rights, waives them, denies all involvement, and demands a polygraph. At approximately 1000, a polygraph examiner is available and the preliminaries begin. Assume forty-five minutes are wasted because of an uncooperative accused but, by 1100, the examination begins. The examination runs until 1145 and, at 1215, the original NIS agent reappears. He informs the accused that the results of the examination indicate deception and proceeds to question the accused further. At 1315, the accused makes certain incriminating statements which are reduced to a written statement and ready for signature at 1400. The accused then refuses to sign the statement, demands a lawyer, and exits the NIS office at 1415. The accused later contests all charges and moves to strike the incriminating statements, arguing the statements were involuntarily coerced. At trial, the military judge admits the statements into evidence and the defense decides to attack the weight to be given the statements. The defense does

²⁵² See Halbleib, *supra* note 8, at 251.

²⁵³ See *United States v. Melanson*, 15 M.J. 765 (A.F.C.M.R. 1983), *pet. denied* 16 M.J. 321 (C.M.A. 1983); *see also* White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

²⁵⁴ MCM, *supra* note 3, MIL. R. EVID. 304(e)(2); *see also* *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990).

²⁵⁵ MCM, *supra* note 3, MIL. R. EVID. 304(e)(2), provides, "If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under the circumstances."

²⁵⁶ *Id.* MIL. R. EVID. 102.

this by eliciting information from either the accused or the NIS agent that the accused was held at the NIS office for over six hours on the day the statements were made. The impression created is that the accused was put in a position of duress over a number of hours, finally capitulating by giving the government a statement of little validity. Because MRE 707 would prevent any mention of the polygraph, the members are now left with a defense-oriented, distorted version of the facts.

The above hypothetical is close to what occurred in *United States v. Hall*.²⁵⁷ In that case, the trial judge warned the accused in advance that if the defense tactic was to impugn the quality of the government's investigation, Government witnesses would be allowed to testify that a full-scale investigation was not deemed necessary because the accused had failed a polygraph examination. At trial, the defense did raise the issue of the quality of the investigation and the polygraph was admitted with an appropriate limiting instruction.²⁵⁸ The Tenth Circuit Court of Appeals upheld the conviction stating, "The probative value of the evidence in sustaining the specific point for which it was being offered here is substantial, and the party offering the evidence was not asserting the accuracy of the test results."²⁵⁹

In *United States v. Kampiles*,²⁶⁰ once again the issue of voluntariness of a confession was raised. When the accused stated his intent to question the voluntariness of his confession, the Government countered by offering evidence that the accused had failed a polygraph exam. The Government's theory of admissibility for the polygraph was not to use it substantively, but to use it on the issue of voluntariness.²⁶¹ The trial court ruled in favor of the Government being allowed to use the polygraph evidence, which resulted in the defense not contesting the voluntariness. On appeal, the Seventh Circuit Court found for the Government and opined as follows:

It would have been unfair to allow defendant to present his account of his admissions, based upon the alleged threats by Agent Murphy, without allowing the government to demonstrate the extent to which failure of the polygraph precipitated the confession. The bargain struck was fair because it affected both parties through prohibitions running to each side. Moreover, it

²⁵⁷ 805 F.2d 1410 (10th Cir. 1986).

²⁵⁸ *Id.* at 1414-17.

²⁵⁹ *Id.* at 1417.

²⁶⁰ 609 F.2d 1233 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1979).

²⁶¹ *Id.* at 1242-43.

left the ultimate decision to the defendant and he deliberately choose to keep out references to both the polygraph and Agent Murphy's alleged statements.
 ...²⁶²

Present in *United States v. Bowen*²⁶³ were multiple accused who had attempted to falsify polygraph results in an effort to cover up the underlying charges. At trial, the Government was allowed to enter into evidence information concerning these tactics as proof of an attempt to evade the charged offenses. The Ninth Circuit Court of Appeals held, "If polygraph evidence is being introduced because it is relevant that a polygraph examination was given, regardless of the result, then it may be admissible."²⁶⁴ This case is a good example of a court recognizing some utility in the limited use of polygraph evidence and its resulting probative value. In other words, the court saw a greater harm in allowing a distortion of the facts than in admitting evidence of the polygraph.

The common theme that runs through the various courts that admit in polygraph evidence for a limited purpose, is a recognition that wholesale exclusion under a per se rule is unwarranted. Even courts that historically have excluded polygraph evidence see the validity of limited use in certain circumstances. The application of MRE 707 in these situations seems to run contrary to the philosophical fairness inherent in the MREs. Additionally, MRE 707 has a direct impact on limiting the Fifth Amendment rights of the accused with the apparent neutralization of MRE 304(e)(2). The unfortunate result is the constant flow of misinformation in an arena dedicated to the finding of truth.

VII. Conclusion

And, after all what is a lie? Tis but the truth in masquerade; and I defy historians, heroes, lawyers, priests, to put some fact without some laven of a lie.²⁶⁵

The search for the truth is often a long and difficult task. While a prophylactic exclusionary rule is the simplest solution to the polygraph dilemma, it too quickly ignores the rights of the

²⁶² *Id.* at 1244.

²⁶³ 857 F.2d 1337 (9th Cir. 1988).

²⁶⁴ *Id.* at 1341.

²⁶⁵ Byron, *Don Juan XI xxxvii*, reprinted in *DICTIONARY OF QUOTATIONS*, *supra* note 72, at 98.

accused and the possible relevance of the polygraph. The widespread reliance on the polygraph as an investigatory tool by the military reinforces its potential role in the courtroom. Presently, the procedures and techniques used by polygraph examiners make the polygraph device more reliable than many forms of scientific evidence routinely admitted. Judicial scrutiny, the adversarial system, the ability to stipulate, and the already existing MREs are capable of incorporating polygraph evidence into traditional norms of admissible evidence. Military Rule Of Evidence **707** should be deleted from the rules of evidence because of the potential for confusion it brings to the courtroom. Specifically, the rule promotes confusion by removing judicial discretion in the evidentiary process, and by running contrary to constitutional case law and other existing rules of evidence. The potential good contained in MRE **707's** exclusionary rule is embraced fairly in MRE **403**. Consequently, MRE **707** as an independent rule has little positive value. Until MRE **707** is deleted, the military courts will have no ability to remain flexible in meeting the myriad of situations that will continue to arise from the widely used polygraph device.

CMLIAN DEMONSTRATIONS NEAR THE MILITARY INSTALLATION: RESTRAINTS ON MILITARY SURVEILLANCE AND OTHER INTELLIGENCE ACTIVITIES

MAJOR PAUL M. PETERSON*

*The ... task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend ... our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to repression.*¹

I. Introduction

Imagine that the commander of a large Army installation convenes a staff meeting. The provost marshal² informs the commander that a civilian demonstration is scheduled outside one of the gates next week. The commander expresses concern about disruptions that this demonstration may cause to military activities. The provost marshal, however, cannot provide the commander with any detailed information about the demonstration. The commander, therefore, instructs the provost marshal and the intelligence officer (G-2)³ to find out everything they can about the planned demonstration and the organization that is sponsoring it. The commander then turns to the staff judge advocate—the senior lawyer on the installation and the chief legal advisor to the commander. The commander asks, “Any problems?”

*Judge Advocate General's Corps, United States Army. Presently assigned as an Instructor, Administrative and Civil Law Division, The Judge Advocate General's School, United States Army. B.S.E.E., *summa cum laude*, 1979, University of California at Berkeley; J.D., *magna cum laude*, 1985, George Washington University; LL.M., 1992, The Judge Advocate General's School, United States Army. This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 40th Judge Advocate Officer Graduate Course.

¹Communications Ass'n v. Doud, 339 U.S. 382, 445 (1950) (Jackson, J., concurring and dissenting).

²This is the staff officer responsible for military police functions on the installation.

³This article assumes the installation commander is also the commander of a collocated combat unit, and the G-2 is the staff officer responsible for intelligence and security in a combat unit. If no collocated combat unit exists, the installation commander will have a specific staff section responsible for security, such as a deputy secretary whose responsibilities include security functions. Nevertheless, the legal analyses presented herein apply regardless of how the staff section responsible for security is labeled.

This factual situation easily might occur. Labor strife could precipitate a demonstration at almost any time. Similarly, during times of international tension, antiwar demonstrations often occur. During the Operations Just Cause, Desert Shield, and Desert Storm, for example, anti-war demonstrations occurred near several different military installations even though the actual hostilities were short in duration and relatively popular.

This article examines the legal ramifications of domestic intelligence collection under these circumstances. Unfortunately, the military's internal guidance for obtaining this intelligence is ill-defined, confusing, and contradictory. As a consequence, commanders unwittingly may initiate a process of information collection and retention that violates the statutory and constitutional rights of individuals who plan or participate in a demonstration.⁴ More importantly, the process may result not only in unwelcome publicity, but also litigation.

11. Organization and Scope

This article begins with a summary of military involvement in domestic intelligence gathering. Historical knowledge aids in understanding the issues developed in this article. This article then sets forth the existing regulatory guidance that affects military surveillance of civilians. The guidance varies considerably depending on whether the commander chooses to use law enforcement or military intelligence personnel to collect information.

This article then measures the existing regulatory guidance against the Privacy Act⁵ and the First Amendment.⁶ These two authorities are the most likely sources of legal challenges to a commander's information gathering processes. This article concludes with proposed changes to a key Department of Defense directive, and how these changes would facilitate consistent regulatory guidance and would lessen the likelihood of a successful legal challenge.

⁴See Eric Lardiere, Comment, *Justiciability and Constitutionality of Political Intelligence Gathering*, 30 U.C.L.A. L. REV. 976, 979 (1983); Howard & Crowley, *Pleading, Discovery, and Pretrial Procedure for Litigation Against Government Spying*, 55 U. DET. J. URB. L. 931, 932-39 (1979); see The Privacy Act of 1974, 5 U.S.C. § 552a (1988); The Freedom of Information Act, 5 U.S.C. § 552 (1988); Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511 (1988) (creating civil cause of action for certain intercepts and uses of oral and wire communications).

⁵The Privacy Act of 1974, 5 U.S.C. § 552a (1988).

⁶"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the rights of the people to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Because most dissent, including anti-war dissent, is of domestic origin,⁷ this article's scope is restricted to collection efforts targeting activities with no foreign sponsorship. The analysis also excludes situations in which the President invokes emergency authority to mobilize the military in response to a civil disturbance or in which the activity in question is being conducted by soldiers or civilians affiliated with the Department of Defense.

Some important terms require definition prior to beginning the discussion. The Army defines "physical security" as follows:

That part of the Army security system, based on threat analysis, concerned with procedures and physical measures designed to safeguard personnel, property, and operations; to prevent unauthorized access to equipment, facilities, materiel, and information; and to protect against espionage, terrorism, sabotage, damage, misuse, and theft.⁸

In this article, "physical security intelligence" will mean any information gathering that focuses on the protection of military operations in the Continental United States (CONUS) when no evidence exists that the persons considered a potential threat are either affiliated⁹ with the Department of Defense or sponsored by any foreign power. "Domestic intelligence," on the other hand, will refer to all intelligence gathering in the United States, by military or civilian agencies, for any purpose, including physical security, preparation for civil disturbance operations, and detection and monitoring of organized crime or terrorists.

111. Historical Background

A. *The Origins of Domestic Intelligence Collection*

The United States military, and more specifically the Army, has been involved in collecting information on the political

"No evidence linking these movements to foreign powers was found . . ." MORTON H. HALPERIN ET. AL., *THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES 163* (1976) (referring to the civil unrest of the 1960s). No evidence ever was uncovered that the various protests and demonstrations of the 1960s were interconnected by any sort of conspiracy, either foreign or domestic. *Subcommittee on Constitutional Rights, Report on Military Surveillance of Civilian Politics Senate Committee on the Judiciary, 93d Cong., 1st Sess., at 5 (Comm. Print 1973) [hereinafter Report on Military Surveillance].*

⁸DEP'T OF ARMY, REG. 190-13, PHYSICAL SECURITY: THE ARMY PHYSICAL SECURITY PROGRAM, glossary (20 June 1985) [hereinafter *AR 190-131*].

"Affiliation" includes almost every voluntary relationship with the military. *See* DEP'T OF ARMY, REG. 380-13, ACQUISITION AND STORAGE OF INFORMATION CONCERNING NONAFFILIATED PERSONS AND ORGANIZATIONS, glossary (30 Sept. 1974) [hereinafter *AR 380-131*].

activities of civilians for one reason or another since the nineteenth century. One scholar who has specialized in the study of military intelligence traces military collection of domestic intelligence back to the formation of the Army's Military Intelligence Division in 1888.¹⁰ World War I, however, brought on the first extensive domestic intelligence operations. Tasked at first to provide information about supposed large-scale German espionage networks—spy rings that never materialized—the military intelligence apparatus began collecting political information on German immigrants and, eventually, persons and organizations whose common goal was opposition to the war. Even though organized domestic intelligence declined during the postwar era, the World War I experience provided a bureaucratic scheme and collection plan that was employed by the military to again step up domestic surveillance in each ensuing period of crisis—crises such as the Bonus March of 1932, World War II, and the Korean War. Because stateside counterintelligence agents tended to be underemployed throughout these periods, most were readily available to perform political surveillance. Significantly, the civilian hierarchy that controlled the military often was ignorant about the extent and nature of domestic intelligence gathering.

Prior to the early 1970s, apparently no written authority for military involvement in domestic intelligence gathering existed. In 1939, President Roosevelt directed that the investigation of all “espionage, counterespionage, and sabotage matters” be controlled and handled exclusively by the Federal Bureau of Investigation (FBI), the “Military Intelligence Division” of the War Department, and “the Office of Naval Intelligence.”¹¹ Subsequent presidential directives tasked the FBI to “take charge” of these same matters and others, such as “subversive activities” and “violations of the neutrality laws.” Nevertheless, the remaining role of the military departments, if any, was not addressed.¹² Only in the area of

“Military Surveillance: Hearings on S.2318 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93d Cong., 2d Sess. 169 (1974) [hereinafter Hearings on Military Surveillance] (statement of Joan M. Jensen, Professor, University of San Diego). Ms. Jensen’s views were adopted largely by the Subcommittee on Constitutional Rights. See Report on Military Surveillance, supra note 7, at 10-20.

“Presidential Directive of June 26, 1939 (untitled), reprinted in 1 ALLAN KORNBLUM, INTELLIGENCE AND THE LAW, C-3 (Defense Intelligence College Course Textbook SM625/SM629, 1985).

¹²Presidential Directive of Sept. 6, 1939 (untitled), reprinted in KORNBLUM, supra note 11, at C-3, C-4; Presidential Directive of Jan. 8, 1943 (Police Cooperation), reprinted in KORNBLUM, supra note 11, at C-3, C-4; Presidential Directive of July 24, 1950 (Information Relating to Domestic Espionage, Sabotage, Subversive Activities, and Related Matters), reprinted in KORNBLUM, supra note 11, at C-3 and C-4. Subsequent agreements between the FBI and the military

personnel loyalty and personnel security was significant written authority¹³ provided to the War Department¹⁴ or its successor, the Department of Defense.

B. The Vietnam War Era

In the late 1950s and early 1960s, the Army became involved in the civil rights conflict. Federalized members of the National Guard, as well as active duty personnel, were mobilized and deployed to stop violence and enforce federal civil rights decrees. Despite a lack of specific authority, the Army began to collect information, often of a personal nature, on activists connected with the civil rights movement. In 1967, the first in a series of large civil disturbances requiring repositioning and use of federal troops took place. Some of these disturbances, like the march on the Pentagon in 1969, involved potential interference with military personnel, property, or operations; other disturbances simply contained a potential for violence beyond the capability of state or local law enforcement to control. In response to a perceived mission requirement, the Army took steps to expand its collection of information, including personal and political information, on individuals and groups that might have any connection with future civil disturbances. Operating with little apparent high-level supervision, two parallel and redundant intelligence collecting apparatus evolved, with an estimated 1500 intelligence operatives. These personnel collected data, using overt and covert collection methods, on a wide range of persons and organizations. No standards or procedures existed to ensure that information was relevant, properly verified, properly organized, and properly disseminated.¹⁵

intelligence services indicated that the FBI “has jurisdiction over all civilians insofar as espionage, counterespionage, subversion and sabotage are concerned, regardless of employment.” Federal Bureau of Investig. et al., Delimitations Agreement Between the FBI and U.S. Military Intelligence Services, para. 3-2 (Feb. 23, 1949) (with supplements), *reprinted in* KORNBLUM, *supra* note 11, at B-49. None of the quoted terms were defined in the documents. A 1979 agreement between the DOD and the FBI in 1979 superseded the delimitations agreement, but discussed only jurisdiction over foreign-based threats and did not otherwise discuss responsibility for “subversive” activities. Federal Bureau of Investig. et al., Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation § 1 (Apr. 5, 1979), *reprinted in* KORNBLUM, *supra* note 11, at B-52.

¹³*See, e.g.*, Exec. Order No. 10,450, 18 Fed. Reg. 2489 (1953) (Security Requirements for Government Employment).

¹⁴The War Department was the predecessor to the Department of Defense.

¹⁵Groups such as the Quakers and the Southern Christian Leadership Conference occasionally were monitored. *Report on Military Surveillance, supra* note 7, at 71. Specific persons listed in the intelligence files included Martin Luther King, Jesse Jackson, and Joan Baez, among others. *Id.* at 79.

C. *The Public Outcry*

In January 1970, a description of the Army's domestic intelligence system and its purported excesses appeared in a national magazine.¹⁶ The Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, opened hearings into the issue in February 1970. The subcommittee report¹⁷ detailed multiple problems with the Army domestic intelligence program, including the collection of personal and political information on nonviolent persons and groups, the covert penetration of targeted organizations, and the retention and possible dissemination of inaccurate information. The subcommittee report stated that the civilians responsible for overseeing the Army had been misinformed and were often unaware of the nature and extent of surveillance activities.¹⁸ The subcommittee report concluded that the military domestic intelligence program was illegal in that no statutory authorization existed for much of the collection activity and the program violated the constitutional rights of the persons subject to collection activities.

D. *The Legal Analysis of the Subcommittee*

The subcommittee applied a three-part legal analysis to the Army's activities.¹⁹ First, it considered whether any part of the Army intelligence collection program was authorized by law. Second, for each part of the program it found to be authorized, the subcommittee determined whether the part infringed on individual constitutional rights. Finally, if an otherwise lawful part of the program was found to infringe such rights, the subcommittee examined whether the infringement was justified by a compelling government interest.

Focusing on the Army's collection of information in preparation for use in potential civil disturbance situations, the subcommittee concluded that the program was not legally authorized. The subcommittee reasoned that no express statutory authority permitted such collection. Moreover, it found that when a citizen's constitutional rights are threatened by military activity, the law could not be implied to confer such authority. The subcommittee also determined that the statutes enabling the use of military force in civil disturbances did not imply that

¹⁶C. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, 1 WASH. MONTHLY, Jan. 1970, at 4. Mr. Pyle also wrote a follow-up article. See C. Pyle, *CONUS Revisited, The Army Covers Up*, 1 WASH. MONTHLY, July 1970, at 49.

¹⁷*Report on Military Surveillance, supra* note 7.

¹⁸*Id.* at 7.

¹⁹*Id.* at 102-16.

military officials could authorize intelligence collection prior to the actual disturbance itself. Specifically, because military force is not authorized until the President personally concludes that civilian law enforcement is inadequate, civilian agencies presumably are perfectly capable of collecting any requisite intelligence until the President actually makes such a conclusion.

The subcommittee also determined that the military's collecting domestic intelligence infringed on the free speech and association rights of those targeted. The subcommittee felt that the mere knowledge that the Army was collecting information on a given individual or group would create fear and apprehension among the subjects, cause them to be more circumspect in all of their political activities, and reduce the likelihood that others would want to associate with them. The subcommittee also implied that the collection procedures used by the military were violative of the constitutional right to privacy.

Finally, the subcommittee concluded that no compelling governmental interest²⁰ could justify the military's infringing the constitutional rights of individual citizens. The military was collecting personal and political information on the theory that the civil disturbances were planned violent events that were linked by a nationwide foreign-sponsored conspiracy. The military, however, never possessed any evidence to demonstrate that the disturbances were any more than a series of unorganized and unrelated events.²¹ Accordingly, the political information that the military sought to collect was of little use anyway. The military was not able to predict the timing, size, or scope of any pending civil disturbance.²² Moreover, resources expended on collecting these political data were diverted from the mission of collecting tactical information—such as data on roads, bridges, and utilities.²³

Finally, the subcommittee noted that, even if the government actually had some legitimate interest in the information collected, the collection of intelligence data by civilian agencies, such as the FBI, would be less intimidating. This finding led the subcommittee to conclude that employing civilian investigative agencies to collect such information always would be constitutionally preferred.²⁴

²⁰The subcommittee cited to *United States v. O'Brien*, 376 U.S. 367, 377 (1968), as the source of constitutional analysis. *Report on Military Surveillance*, *supra* note 7, at 115; see also *infra* notes 229-230 and accompanying text (discussing *O'Brien*).

²¹*Report on Military Surveillance*, *supra* note 7, at 5.

²²*Hearing on Military Surveillance*, *supra* note 10, at 178-80 (statement of Professor C. Pyle).

²³*Report on Military Surveillance*, *supra* note 7, at 42.

²⁴*Id.* at 9, 108-09.

E. The Laird v. Tatum Case

In February 1970, several individuals and groups who claimed to be subjects of Army surveillance filed suit in federal district court, alleging that the Army surveillance violated their First Amendment rights. The plaintiffs sought declaratory and injunctive relief, to include an order to destroy all information collected about them and a further declaration that the Army's activities were beyond the scope of any existent legal authority. The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals, however, reversed²⁵ and ordered an evidentiary hearing. Nevertheless, before the hearing could be convened, the Supreme Court granted the Government's petition for certiorari. On June 26, 1972, the Supreme Court held²⁶ that the plaintiffs had failed to allege a form of personal injury sufficient for standing purposes. Chief Justice Burger, writing for a five-justice majority,²⁷ stated that general allegations of negative impact on the rights of free speech, association, and privacy were not the types of specific present or future harm that Article III courts had jurisdiction to adjudicate.

The majority opinion implied that, if the information collected by the Army resulted in an allegation of a specific injury—for example, a loss of employment or loss of security clearance—the injured party might have standing to challenge the Army's information collection practices. Contemporaneous complaints filed in other courts by plaintiffs similarly situated were dismissed based on the result in *Laird v. Tatum*.²⁸ While these cases were being processed, the Department of Defense (DOD) was busy trying to purge its data banks and formulate internal guidance for future domestic intelligence collection.

F. The Military Reaction

As early as 1967, senior officials in the Department of the Army (DA) were awakening to the domestic intelligence problem.²⁹ Not until 1970, however, was Army-wide guidance

²⁵*Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971), *rev'd*, *Laird v. Tatum*, 408 U.S. 1 (1972).

²⁶*Laird v. Tatum*, 408 U.S. at 3.

²⁷Justice Rehnquist voted with the majority in reversing the decision of the court of appeals. Previously, Attorney General Rehnquist had defended the Army's intelligence program through personal testimony before Congress. Justice Rehnquist, however, refused to recuse himself from the *Laird v. Tatum* case. *Hearings on Military Surveillance*, *supra* note 10, at 90 n.3 (statement of John F. Shattuck, National Staff Counsel, American Civil Liberties Union).

²⁸*American Civil Liberties Union v. Laird*, 463 F.2d 499 (7th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973).

²⁹*Report on Military Surveillance*, *supra* note 7, at 84-88.

promulgated. On December 15, 1970, the DA published a policy letter authorizing the collection of information on civilians for certain reasons, including "unauthorized demonstrations on active ... Army installations or through (sic) demonstrations immediately adjacent to them which are of a size or character that they are likely to interfere with the conduct of military activities."³⁰

G. Attempts to Legislate

As a result of the hearings held by the Subcommittee on Constitutional Rights, Senator Sam Ervin, Chairman of the subcommittee, introduced a bill³¹ designed to place specific statutory limits on domestic intelligence collection by the military. Senate Bill 2318 was proposed as a criminal statute. It purported to forbid any military officer from investigating, recording, or maintaining information on "the beliefs, associations, or political activities" of persons and organizations not affiliated with the military. The bill contained four narrow exceptions³² to the general prohibition and provided aggrieved persons with a civil cause of action.

Hearings were held on Senate Bill 2318 in April 1974. The DOD, however, strenuously opposed the bill,³³ arguing that the legislation was unnecessary because the excesses of the past had been eliminated. The DOD specifically cited to new internal regulations and oversight mechanisms that it had adopted to prevent the problems from recurring.

Senate Bill 2318 did not pass the full Senate and never became law. The failure of this legislation, combined with the refusal of the Supreme Court in *Laird v. Tatum* to reach the substantive First Amendment issues surrounding domestic intelligence, apparently left the DOD with significant regulatory flexibility.³⁴

The relevant law, however, evolved faster than the regulatory guidance. Senator Ervin continued his work in the area of

³⁰The subject of the letter was "Counterintelligence Activities Concerning Civilians not Affiliated with the Department of Defense." The letter is discussed, but not reprinted, in *Report on Military Surveillance*, *supra* note 7, at 92.

³¹S.2318, 93d Cong., 1st Sess. (1973).

³²The exceptions were limited to specific civil disturbance, physical security, and personnel security situations. *Id.* § 2(b). The physical security exception covered investigations of "criminal conduct committed on a military installation or involving the destruction, damage, theft, unlawful seizure, or trespass of the property of the United States . . ." *Id.* § 2(b)(2).

³³*Hearings on Military Surveillance*, *supra* note 10, at 103-24 (statement by David O. Cooke, Chairman, Defense Investigative Review Council).

³⁴Actually, the two key military regulations, DEP'T OF DEFENSE, DIRECTIVE 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (Jan. 7, 1980) [hereinafter DOD DIR. 5200.271, and AR 380-13, *supra* note 9, are largely or entirely unchanged since the early 1970s. See *infra* notes 36-45 and accompanying text.

privacy and the control of information throughout 1974. He and the Government Operations Committees of the House and Senate drafted the Privacy Act,³⁵ which became law on January 1, 1975. Moreover, decisions rendered subsequent to *Laird v. Tatum* have cast into doubt its vitality as a barrier to plaintiffs challenging military surveillance. Consequently, defining the limits of military domestic intelligence gathering depends on an analysis of military regulations, the Privacy Act, and *post-Laird v. Tatum* decisions involving the First Amendment.

IV. Existing Regulatory Guidance

Several regulations and directives impact on the collection of physical security intelligence. Three of these documents, however, are particularly important: *Department of Defense Directive 5200.27, Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*,³⁶ *Army Regulation (AR) 380-13, Acquisition and Storage of Information Concerning Nonaffiliated Persons and Organizations*,³⁷ and *AR 381-10, U.S. Army Intelligence Activities*.³⁸ This article will refer to these three documents collectively as “the physical security intelligence regulations.”

The Secretary of Defense issued *DOD Directive 5200.27*—the first formal guidance on collection of information concerning nonaffiliated civilians—on March 1, 1971. The format and terminology of *DOD Directive 5200.27* differed from the then-existing Army policy letter on the same subject.³⁹ The Army issued *AR 380-13*, to implement *DOD Directive 5200.27*, on September 30, 1974. Unfortunately, *AR 380-13* used somewhat different organization and terminology than *DOD Directive 5200.27* used, creating some potential for confusion.⁴⁰

In 1978, the Foreign Intelligence and Surveillance Act (FISA)⁴¹ was enacted. The FISA set forth specific guidance on the conduct of electronic surveillance when targeting foreign powers

³⁵ 5 U.S.C. § 552a (1988).

³⁶ See *supra* note 34.

³⁷ See *supra* note 9.

³⁸ DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (1 July 1984) [hereinafter *AR 381-10*].

³⁹ *DOD DIR. 5200.27*, *supra* note 34, for example, discussed only demonstrations occurring on post; the Army policy letter, however, included demonstrations immediately adjacent to post.

⁴⁰ *AR 380-13*, *supra* note 9, for example, retained the language about demonstrations immediately adjacent to the post. Additionally, *AR 380-13* did not apply to criminal investigations while *DOD Dir. 5200.27* was applicable to criminal investigations. See *infra* note 49 and accompanying text.

⁴¹ 50 U.S.C. §§ 1801-11 (1988).

and their agents. The President then issued Executive Order 12,036,⁴² implementing the FISA and establishing additional guidance for the intelligence community on the conduct of domestic investigative techniques other than electronic surveillance. The DOD, in turn, produced a new regulatory scheme applicable to certain "intelligence components" and "intelligence activities."⁴³ The Army subsequently issued *AR 381-10* to implement this new scheme.⁴⁴

Although *AR 381-10* is a product of a series of events beginning with the FISA, the scope of *AR 381-10* is much wider than the FISA. The purpose of *AR 381-10* is to regulate all the surveillance activities of Army intelligence components, whether or not such surveillance is "electronic" and whether or not a foreign connection exists. Unfortunately, *AR 380-13* has not been revised to reflect the sequence of events which produced *AR 381-10*. The existence of *AR 381-10* therefore creates additional confusion in the physical security intelligence arena.⁴⁵

The applicability of the individual physical security intelligence regulations generally depends on who is tasked to collect the information. On an Army installation, for instance, the personnel available to perform this mission include the provost marshal, who could employ internal military police (MP) assets, and the installation *G-2*. The local counterintelligence (CI) unit also might be tasked to respond to the commander's request for assistance. A summary and comparison of MP, *G-2*, and CI authority to conduct physical security intelligence operations follows.

A. Military Police

Pursuant to Army regulations,⁴⁶ the installation commander is responsible for the security of the personnel, property, and operations under his or her command. The missions of assigned

⁴²Exec. Order No. 12,036, 43 Fed. Reg. 3674 (1978) (United States Intelligence Activities), *superseded* by Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981) (United States Intelligence Activities).

⁴³DEPT OF DEFENSE, DIRECTIVE 5240.1, ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (Nov. 30, 1979) (cancelled and reissued Dec. 3, 1982; cancelled and reissued Apr. 25, 1988) [hereinafter DOD DIR. 5240.1]; DEPT OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (Dec. 1982).

⁴⁴*AR 381-10*, *supra* note 38, initially was issued on 15 February 1982 and subsequently was reissued on 1 July 1984.

⁴⁵*See, e.g., id.* (controls and limits the activities of all counterintelligence units). Language in *AR 380-13*, however, apparently delineates the functions of counterintelligence units in situations involving demonstrations. *See AR 380-13*, *supra* note 9, para. 6a(4).

⁴⁶*AR 190-13*, *supra* note 8, para. 1-5q(1).

MP personnel include "(activities directed at the prevention of crimes ... or as required for the security of persons and property under Army control. ...)"⁴⁷ Additionally, installation MPs establish and maintain a criminal information program. The purpose of this program is to collect, categorize, and process information that will "identify individuals or groups of individuals in an effort to anticipate, prevent, or monitor possible criminal activity."⁴⁸

1. Collection Threshold.—Specific guidance is available on when information on nonaffiliated civilians may be collected. The text of DOD Directive 5200.27 cites, as separate bases for acquiring information, not only concern over the effects of demonstrations, but also the need to investigate and prosecute crimes under DOD jurisdiction. The text of *AR 380-13*, however, does not apply to criminal investigations, indicating instead that "authorized criminal investigation and law enforcement intelligence activities (i.e., not counterintelligence related)" are covered by other, unspecified, regulations. Because criminal investigative activities and law enforcement intelligence are not defined in *AR 380-13*, its application to MP activities conducted for physical security purposes is uncertain.⁴⁹ Most of the definitive guidance, therefore, must be drawn directly from DOD Directive 5200.27.

Information on nonaffiliated personnel may be collected and reported if doing so is essential to protect threatened defense personnel or defense activities and installations. The threat must take the form of acts of subversion, theft, or destruction of DOD property; acts jeopardizing the security of DOD elements or operations; demonstrations on active DOD installations; or crimes for which DOD has responsibility for investigating or prosecuting.⁵⁰ No information may be acquired about a person solely because

⁴⁷DEPT OF ARMY, REG. 190-30, LAW ENFORCEMENT: MILITARY POLICE INVESTIGATIONS, para. 3-14a(4) (1 June 1978) [hereinafter *AR 190-30*].

⁴⁸AR 190-30, *supra* note 47, para. 3-18a; DEPT OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING, para. 2-6a (30 Sept. 1988) [hereinafter *AR 190-45*] (discussion of purpose of criminal information program).

⁴⁹Counterintelligence is defined as "activities, both offensive and defensive, designed to detect, neutralize or destroy the effectiveness of foreign intelligence activities." *AR 380-13*, *supra* note 9, at A-2. Because this article assumes no foreign connection, any military police activity for physical security purposes arguably is "not counterintelligence related," and is therefore within the exception to *AR 380-13*. Physical security operations also may be considered as a form of crime prevention, and crime prevention activities specifically are excluded from *AR 380-13*. *AR 190-30*, *supra* note 47, para. 3-18a. The provisions of *AR 190-45*, *supra* note 48, however, state that *AR 380-13* applies to the retention and disposition of information acquired by military police, and implies that *AR 380-13* also applies to the acquisition of such information. *AR 190-45*, *supra* note 48, paras. 2-4, 2-6.

⁵⁰DOD DIR. 5200.27, *supra* note 34, para. D.1.

he or she lawfully advocates measures in opposition to government policy.⁵¹

2. Limitations on the Type of Information Collected.—The information collected must be essential to the mission.⁵² Information concerning purely political activities, personalities, or activities in which no crime is indicated or suspected, will not be collected, recorded, or reported in the MP criminal information system.⁵³ No record describing how an individual exercises rights guaranteed by the First Amendment may be maintained unless pertinent to, and within the scope of, an authorized law enforcement activity.⁵⁴

3. Limitations on Collection Methods.—Maximum reliance shall be placed on federal civilian investigative agencies and their state and local counterparts.⁵⁵ No covert, or otherwise deceptive, surveillance or penetration of civilian organizations⁵⁶ is permitted unless specifically authorized by the Deputy Undersecretary of Defense after coordination with the FBI.⁵⁷ Similarly, electronic surveillance is prohibited except as authorized by law.⁵⁸ No personnel will be assigned to attend public or private meetings, demonstrations, or other similar activities⁵⁹ without the specific, prior approval of the Secretary or Undersecretary of the Army,⁶⁰ unless the local commander determines that the threat is immediate and time precludes obtaining prior approval.⁶¹

4. Limitations on Retention.—According to DOD Directive 5200.27, information shall be destroyed within ninety days of collection unless its retention specifically is authorized under criteria established by the Deputy Undersecretary of Defense (Policy Review).⁶² No formal criteria have been published.⁶³

⁵¹*Id.* para. E.2.

⁵²*Id.* para. E.1.

⁵³AR 190-30, *supra* note 47, para. 3-18a.

⁵⁴DEP'T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM, para. 4-5 (5 July 1985) [hereinafter AR 340-21]. This language is taken verbatim from the Privacy Act of 1974, 5 U.S.C. § 552a(e)(7) (1988). *See infra* notes 102-135 and accompanying text.

⁵⁵DOD DIR. 5200.27, *supra* note 34, para. C.3.

⁵⁶*Id.* para. E.5.

⁵⁷*Id.* para. B.

⁵⁸*Id.* para. E.4.

⁵⁹*Id.* para. E.6.

⁶⁰*Id.* encl. 1, para. D.

⁶¹*Id.* para. E.6.

⁶²*Id.* para. F.4.

⁶³AR 380-13, *supra* note 9, para. 8, implies that certain information may be retained beyond 90 days. The application of AR 380-13 to military police, however, is uncertain. *See supra* note 40 and accompanying text.

B. The Staff Intelligence Officer

Although the applicability of *AR 380-13* to military police activities is unclear, it certainly applies to **G-2** activities. The provisions of both *AR 380-13* and DOD Directive *5200.27* apply to the activities of the **G-2** when collecting information about nonaffiliated civilians.⁶⁴

1. Collection Threshold.—Information on persons and organizations not affiliated with the DOD may be gathered in connection with the protection of Army personnel, functions, and property if a reasonable basis exists to believe that one or more of several express situations has arisen.⁶⁵ One situation is a demonstration on, or immediately adjacent to, the installation of such a size or character that it is likely to interfere with the conduct of military activities. A second situation arises when a theft or destruction of equipment or facilities belonging to DOD units or installations has occurred. A third situation is “[s]ubversion of loyalty, discipline or morale of . . . military . . . personnel by actively encouraging violation of laws, disobedience of lawful orders and regulations, or disruption of military activities.”⁶⁶ Nevertheless, the acquisition of information on a person “solely because of lawful advocacy of measures in opposition to U.S. government policy or because of activity in support of racial and civil rights interests” is prohibited.⁶⁷

2. Types of Information that May Be Collected.—The information to be gained must “relate” to the described collection situation.⁶⁸ No record describing how an individual exercises rights guaranteed by the First Amendment may be maintained unless pertinent to, and within the scope of, an authorized law enforcement activity.⁶⁹

3. Limitations on Collection Methods.—To determine whether an actual or potential threat situation exists, the

⁶⁴Although DOD DIR. 5200.27, *supra* note 34, excludes “DOD intelligence components,” the staff G-2 is not such a component. The DOD’s intelligence components are defined using a specific listing of intelligence units and commands, along with a broad definition that encompasses other staffs and organizations when used for “foreign intelligence or counterintelligence purposes.” DOD DIR. 5240.1, *supra* note 43, para. 4. Both foreign intelligence and counterintelligence activities specifically are limited to operations involving foreign powers or international terrorists. *Id.* paras. 3, 4. The staff G-2 is not one of the specifically listed intelligence units or commands, and this article assumes no foreign connection. For similar reasons, Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981) (U.S. Intelligence Activities), and *AR 381-10*, *supra* note 38, are inapplicable.

⁶⁵*AR 380-13*, *supra* note 9, para. 6a.

⁶⁶*Id.* para. 6a(3).

⁶⁷*Id.* para. 9a.

⁶⁸*Id.* para. 6c(2).

⁶⁹*AR 340-21*, *supra* note 54, para. 4-5.

commander will conduct routine liaison with local law enforcement agencies and will conduct “counterintelligence surveys and inspections.”⁷⁰ If the commander has reason to believe that additional information about nonaffiliated persons is needed, further inquiries will be made to local law enforcement agencies via the local counterintelligence liaison unit. If the commander has reason to believe that an actual or potential threat situation exists—and the local law enforcement authorities cannot or will not provide requested information—the commander may request authority from Headquarters, Department of the Army, (HQDA) to conduct a “special investigation/operation.”⁷¹

Electronic surveillance is prohibited, except as authorized by “law and regulation.”⁷² The Undersecretary of Defense must authorize any covert or otherwise deceptive penetration of civilian organizations after approval by the Defense Investigative Review Committee (DIRC).⁷³ Likewise, the Undersecretary must approve attendance at any public or private meetings, demonstrations, or other similar activities, except when the local commander “in his [or her] judgment,” perceives the threat as immediate and time precludes obtaining prior approval.⁷⁴ The commander then may dispatch investigators to observe a demonstration that meets the collection threshold.⁷⁵

4. Limitations on Retention.—According to DOD Directive 5200.27, information shall be destroyed within ninety days of collection unless its retention specifically is authorized under criteria established by the Deputy Undersecretary of Defense (Policy Review).⁷⁶ No formal criteria have been published. Nevertheless, AR 380-13 contains some criteria that allow for retention beyond ninety days. For instance, information may be retained if, in the previous year, the subject individual or organization has been connected with an actual example of violence or criminal hostility directed against the Army; has been connected to a specific threat to Army personnel, functions, or property; exhibits a “continuing hostile nature in the vicinity of Army installations [that] continues to provide ... a significant potential source of harm or disruption of the installation or its

⁷⁰AR 380-13, *supra* note 9, para. 6b. Reference is made to an Army Regulation 381-130, which was superseded by AR 381-20 in September 1975.

⁷¹*Id.* para. 6b.

⁷²*Id.* para. 9c.

⁷³*Id.* para. 9d. The DIRC was established by DEP'T OF DEFENSE, DIRECTIVE 5200.26, DEFENSE INVESTIGATIVE PROGRAM (Feb. 17, 1971). This directive was cancelled on June 12, 1979, and the DIRC no longer exists.

⁷⁴AR 380-13, *supra* note 9, para. 9e.

⁷⁵*Id.* para. 6e.

⁷⁶DOD DIR. 5200.27, *supra* note 34, para. F.4.

functions;" or has "counseled or published information actively encouraging Army personnel to violate the law, disrupt military activities, or disobey lawful orders."⁷⁷

C. Counterintelligence Units

Unlike the G-2 staff section, the local counterintelligence unit is a "DOD intelligence component."⁷⁸ Accordingly, the provisions of *AR 381-10 apply*,⁷⁹ while DOD Directive 5200.27 and *AR 380-13* are expressly inapplicable.⁸⁰

1. Collection Threshold.—The text of *AR 381-10* allows for collection of information that identifies a United States person only if it is collected for a specifically enumerated purpose that is an assigned function of the collecting unit. Intelligence components may collect information about a person if the information is "publicly available" or if the person is "reasonably believed to threaten the physical security of DOD employees, installations, operations, or official visitors."⁸¹ Collection of information, however, is limited to threats posed by terrorists or foreign governments.⁸² Terrorism is defined as the use or threat of violent acts to attain goals political, religious, or ideological in nature. Terrorism in this context does not require a foreign connection; it may be sponsored wholly by a domestic group.⁸³

⁷⁷*AR 380-13*, *supra* note 9, para. 8b.

⁷⁸*See supra* note 64 and accompanying text.

⁷⁹The provisions of *AR 381-10* do not apply to "law enforcement activities, including civil disturbances, that may be undertaken by DOD intelligence components." *AR 381-10*, *supra* note 38, para. A.3. The definition of "law enforcement activities" ("Activities undertaken for the purpose of detecting violations of law or to locate and apprehend persons who violate the law . . .," *see AR 381-10*, *supra* note 38, app. A, para. 18), along with the remaining language of para. A.3., indicates that security measures taken prior to the commission of an actual criminal act would not be "law enforcement activities."

⁸⁰DOD DIR. 5200.27, *supra* note 34, para. B.3.; *AR 380-10*, *supra* note 9, para. 2. Although *AR 380-13* specifically discusses the role of the local counterintelligence liaison unit, to the extent this role is inconsistent with the provisions of *AR 380-10* (a more recent regulation), the provisions of *AR 380-13* are inapplicable.

⁸¹*AR 381-10*, *supra* note 38, procedure 2, para. C.7; DEP'T OF ARMY, REG. 381-20, U.S. ARMY COUNTERINTELLIGENCE ACTIVITIES, para. 2-2(f)(2) (27 Oct. 1986) [hereinafter *AR 381-20*], provides that "Army CI may take investigative actions necessary to . . . protect the security of Army installations, information, functions, activities, and installations."

⁸²*AR 381-20*, *supra* note 81 goes beyond DOD intelligence directives, *see, e.g.*, DEP'T OF DEFENSE, DIRECTIVE 5240.2, DOD COUNTERINTELLIGENCE (June 6, 1983) [hereinafter DOD DIR. 5240.2]; DOD DIR. 5240.1, *supra* note 43, in authorizing Army counterintelligence units to become involved in countering peacetime domestic terrorism. Compare *AR 381-20*, *supra* note 81, glossary (definition of counterintelligence includes terrorism; terrorism not limited to foreign connection) and *id.* para. 3-2b(3) (specific counter-terrorism role) with DOD DIR. 5240.2, *supra*, para. C.1 (definition of counterintelligence activities that implies a requirement for a foreign connection or, if none, a period of war).

⁸³*AR 381-20*, *supra* note 81, glossary, at 22.

The collection of information relating to a United States person solely because of lawful advocacy of measures in opposition of government policy is not authorized.⁸⁴

2. Types of Information That May Be Collected.—No specific regulatory limits exist on the content of information that may be collected.

3. Limitations on Collection Methods.—Information should be collected from publicly available sources with the consent of the subject. If this approach is “not feasible or sufficient,” the investigator should use other “lawful investigative techniques.”⁸⁵

Certain techniques are specifically controlled. Physical surveillance⁸⁶ may be conducted only on personnel affiliated with the military.⁸⁷ Undisclosed participation in the activities of domestic organizations is not permitted.⁸⁸ Nevertheless, attendance at public organizational meetings—or meetings or activities that involve organization members, but that are not functions or activities of the organization itself—does not constitute participation.⁸⁹ Whether any regulatory provisions actually limit the use of nonconsensual electronic surveillance,⁹⁰ nonconsensual physical searches,⁹¹ or mail searches⁹² is unclear.

⁸⁴AR 381-10, *supra* note 38, procedure 2, para. A.

⁸⁵*Id.* procedure 2, para. D.

⁸⁶Physical surveillance is defined as “a systematic and deliberate observation of a person by any means on a continuing basis, or the acquisition of a nonpublic communication by a person not a party thereto or visibly present thereat through any means not involving electronic surveillance.” *Id.* procedure 9, para. B.

⁸⁷*Id.* procedure 9, para. C.1. Different criteria apply outside the continental United States.

⁸⁸*Id.* procedure 10, para. C.1a. This provision limits undisclosed participation to that “essential to achieving a lawful foreign intelligence or counterintelligence purpose.” Without a foreign connection, there can be no such purpose. See DOD DIR. 5240.1, *supra* note 43, paras. C.2, C.3 (definitions of “foreign intelligence” and “counterintelligence”).

⁸⁹AR 381-10, *supra* note 38, procedure 10, para. B.4.

⁹⁰DOD DIR. 5240.1, *supra* note 43, is not applicable to domestic intelligence operations. Nevertheless, AR 381-10, *supra* note 38, which implements DOD Dir. 5240.1, adds the following language: “Information may be gathered by intelligence components using techniques described in procedures 5 through 10 for other than foreign intelligence or counterintelligence purposes . . .” AR 381-10, *supra* note 38, procedure 1, para. A.1. On the other hand, AR 381-10, *id.* procedure 5, part 1 discusses electronic surveillance procedures pursuant to the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11 (1988), which has no relevance to physical security intelligence operations. The remainder of AR 381-10, *id.* procedure 5, also appears to be irrelevant to physical security intelligence operations.

⁹¹AR 381-10, *supra* note 38, procedure 7. This procedure authorizes unconsented physical searches within the United States of active duty personnel for counterintelligence purposes if, and only if, a military commander or judge has probable cause to believe that targeted persons are acting as agents of foreign powers.

⁹²See *id.* procedure 8.

D. Comparison of Regulatory Guidance

The difference in the guidances provided by the regulations that may apply in a particular situation may be quite significant. If certain categories of functional personnel are covered by a regulatory restriction, the commander or HQDA might use another approach to obtain needed information. Counterintelligence units apparently are limited to investigations involving violent acts for political, religious, or ideological ends; on the other hand, neither a violent threat nor a political end is a prerequisite for MP or G-2 involvement. Military police involvement may be limited to on-post demonstrations, while the G-2 is authorized to investigate demonstrations occurring adjacent to the installation.

The applicability of the regulations to certain situations may create additional dichotomies as to who is authorized to act. For example, CI personnel may not conduct physical surveillance, but MP and G-2 personnel are not so limited. Similarly, CI personnel may attend public—but not private—organizational meetings, while MP and G-2 personnel may attend any meeting—public or private—with the approval of either HQDA or, in an emergency, the commander. Further, CI personnel may not participate actively in, nor may they influence, the activities of an organization. On the other hand, even though MP and G-2 personnel must obtain prior approval before covert or otherwise deceptive penetration of an organization, no limitation exists on the extent of their participations following such a penetration. Finally, MP personnel may not place information about purely political activities, personalities, or activities, in which no crime is indicated or suspected, into the military criminal information system.

V. Statutory Analysis

A. *The Privacy Act*

The tumult of the early 1970s did not produce any legislation that was directed specifically toward the military. Nevertheless, the perceived invasion of privacy resulting from the actions of the federal government, both civilian and military,⁹³ eventually did produce some legislation—The Privacy Act of 1974 (Privacy Act or Act).

⁹³ See *Joint Comm. on Gov't Operations, Legislative History of the Privacy Act of 1974*, 94th Cong., 2d Sess., S.3418 (Public Law 93-579); Source Book on Privacy, at 5-6 [hereinafter Source Book on Privacy] (introductory remarks of Senator Sam J. Ervin, Jr.).

⁹⁴ 5 U.S.C. § 552a (1988).

The Privacy Act focuses on federal government records that contain information about a specific individual. The Act places restrictions on both the type of information that may be contained in a Privacy Act record and how that information is used and disseminated. Most of the Act's provisions apply only to "systems of records,"⁹⁵ or records about individuals that are retrieved by reference to the individual's name or other personal identifier.

Two provisions of the Privacy Act are of specific concern to the collector of physical security intelligence. Subsection (e)(7)⁹⁶ of the Act provides, with limited exceptions, that no agency will maintain records describing how activities protected by the First Amendment are exercised. In addition, subsection (e)(1)⁹⁷ provides that records maintained by the agency must be relevant and necessary to accomplish a purpose of the agency.

Physical security intelligence collection likely will include information about specific persons. Collection will include evidence of any planning to disrupt military activities, any past history of disruption of federal activities, any past advocacy of such disruption, and any association with groups that have advocated or participated in such disruption.

Information received or collected probably will be recorded in some permanent form—such as writings, video recordings, or photographs—for future reference. The information may be kept in the personal notes of the investigator, or it may be reproduced and filed in some filing system. If placed in a filing system, the information likely will be placed in one or more files expressly subject to the Act. Such files may include United States Army Intelligence and Security Command (USAINSCOM) investigative files,⁹⁸ counterintelligence operations files,⁹⁹ or local criminal

⁹⁵*Id.* § 552a(a)(5).

⁹⁶*Id.* § 552a(e)(7).

⁹⁷*Id.* § 552a(e)(1).

⁹⁸Privacy Act System Number A0502.10aDAMI, *reprinted in* DEP'T OF ARMY, PAMPHLET 25-51, THE ARMY PRNACY PROGRAM—SYSTEM NOTICES AND EXEMPTION RULES, para. 6-7a (1 Oct. 1988) [hereinafter DA PAM. 25-51]. This system of records is located at INSCOM Headquarters with "decentralized segments" at "groups, field stations, battalions, detachments, and field officers [sic] worldwide." Categories of individuals covered specifically include "individuals about whom there is a reasonable basis to believe that they are engaged in, or plan to engage in, activities such as (1) theft, destruction, or sabotage of ... equipment [or] facilities ... (2) demonstrations on active ... installations or immediately adjacent thereto which are of such character that they are likely to interfere with the conduct of military operations." *Id.* para. 6-7b. The relevant purposes are "to provide authorized protective service; and to conduct counterintelligence and limited reciprocal investigations." *Id.* para. 6-7e. The information may be collected from various sources, including the interview of individuals who have knowledge of the subject's background and activities or

information files.¹⁰⁰ Even if the information is not placed in a formally established filing system, the record still will be subject to the relevant Privacy Act restrictions if it is shared with anyone in the office in which it is retained.¹⁰¹

1. *Subsection (e)(7).*—

Each agency that maintains a system of records shall ... maintain no record describing how any individual exercises rights guaranteed by the first amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.¹⁰²

Any physical security intelligence in the context of a demonstration undoubtedly will contain references to activities that are the subject of First Amendment protections. A record of an individual's involvement in a demonstration almost unavoidably will describe activities that are protected by the rights to assemble peaceably, engage in the free expression of ideas, and, perhaps, petition the government for redress of grievances. Additionally, a record that links an individual to other individuals or groups involved in or planning a protest almost invariably will describe activities protected by the penumbral right to associate freely. Finally, a record that describes advocacy of political change, even through violent means, describes activity that will trigger scrutiny under the First Amendment.

The only exception to subsection (e)(7) with any potential relevance in a physical security intelligence context is for records

"other individuals deemed necessary." *Id.* para. 6-7i. The records are maintained on microfiche. *Id.* para. 6-7g. The only instructions on retention and disposal apply to personnel security investigative files. *Id.* para. 6-7g(4). The only applicable routine uses are "to provide information for ongoing security and suitability investigations ..." or to "assist federal agencies in the administration of criminal justice and prosecution of offenders." *Id.* para. 6-7f(9), f(10).

⁹⁹Privacy Act System Number ID-A0503.06aDAMI, *reprinted in* DA PAM. 25-51, *supra* note 98, para. 6-9. This system of files is located at the same locations as the USAINSCOM investigative files. The same information relevant to individuals involved in demonstrations may be retained. The categories of records in the system, however, appear to be limited to records with some foreign connection. DA PAM. 25-51, *supra* note 98, para. 6-9c.

¹⁰⁰Privacy Act System Number ID-A0509.21DAPE, *reprinted in* DA PAM. 25-51, *supra* note 98, para. 6-25. This system of records covers "any citizen or group of citizens suspected or involved in criminal activity directed against or involving the United States Army." DA PAM. 25-51, *supra* note 98, para. 6-25b.

¹⁰¹Personal notes that are not kept private are considered to be agency records subject to the Privacy Act. *See* *Bowyer v. U.S. Dept. of Air Force*, 804 F.2d 428, 431 (7th Cir. 1986); *Boyd v. Secretary of the Navy*, 709 F.2d 684 (11th Cir. 1983); *Chapman v. National Aeronautic and Space Admin.*, 682 F.2d 526, 529 (5th Cir. 1982).

¹⁰²5 U.S.C. § 552a(e)(7) (1988).

that are “pertinent to and within the scope of an authorized law enforcement activity.”¹⁰³ The key issue is whether information gathering on nonaffiliated civilians, to avoid or alleviate a possible future disruption of military activities, fits within this exception.

The regulatory interpretation, the legislative history, and the case law interpreting subsection (e)(7) are ambiguous on this issue. The plain meaning of the term “law enforcement,” however, suggests that the law enforcement exception to the Act should not cover physical security intelligence operations.

(a) The Office of Management and Budget Guidelines.— Neither “law enforcement” nor “law enforcement activity” are defined in the Privacy Act. Pursuant to statutory authorization,¹⁰⁴ the Office of Management and Budget (OMB) has published guidelines¹⁰⁵ on the interpretation and application of the Act. The guidelines, however, do not clarify the scope of the law enforcement exception.¹⁰⁶

(b) The Legislative History.— The official legislative history of the Privacy Act is brief, and is not helpful in clarifying the intent behind the law enforcement exception. The Act, in its final form, apparently was a hasty compromise between competing House and Senate bills. The language of subsection (e)(7) came from a last-minute House amendment. The official legislative history appears as a Senate Report on a previous attempt at compromise, and the language of subsection (e)(7) did not exist at the time the official legislative history was drafted.

¹⁰³The other two exceptions are for information gathered under express authorization of statute or with the consent of the subject individual. *Id.* “I know of no existing or enforceable statute which expressly and generally authorizes any particular agency to maintain ... records of political or religious activities ...” 120 CONG. REC. 36,650 (1974) (statement of Representative Ichord concerning H.R. 16,373), *reprinted in* Source Book on Privacy, *supra* note 93, at 901.

¹⁰⁴The Privacy Act of 1974, Pub. L. No. 93-579, § 6, 88 Stat. 1909 (1974).

¹⁰⁵OFFICE OF MANAGEMENT AND BUDGET, IMPLEMENTATION OF THE PRIVACY ACT OF 1974, SUPPLEMENTARY GUIDANCE, 40 Fed. Reg. 56,741 (1975) (supplementing OFFICE OF MANAGEMENT AND BUDGET, RESPONSIBILITIES FOR THE MAINTENANCE OF RECORDS ABOUT INDIVIDUALS BY FEDERAL AGENCIES, 40 Fed. Reg. 28,948 (1975)) [hereinafter OMB Guidelines].

¹⁰⁶The OMB Guidelines indicate that the law enforcement activity exception to subsection (e)(7) applies only if the record is required for “an authorized law enforcement function,” but the OMB Guidelines provide no further enlightenment on the meaning of “law enforcement.” *Id.* at 28,965. One commentator cites the OMB Guidelines for the proposition that the law enforcement exception “applies to civil and criminal law enforcement as well as intelligence activities.” John F. Joyce, *The Privacy Act: A Sword and a Shield and Sometimes Neither*, 99 MIL. L. REV. 113, 131-32 (1983). No mention of “intelligence activities” appears in the OMB Guidelines’ discussion of subsection (e)(7), and no support for the further implication that intelligence activities divorced from civil or criminal law enforcement are encompassed by the law enforcement exception.

Some unofficial legislative history, however, does exist. Representative Ichord, who drafted the final language of subsection (e)(7), submitted a statement supportive of a broad, but undefined, interpretation of "law enforcement activity." Representative Ichord specifically mentioned investigations for personnel security and access to classified information as within his concept of "law enforcement activity."¹⁰⁷

On the other hand, the unofficial legislative history of the Senate's deliberations on the exception forms a basis for a contrary interpretation—that is, an interpretation that would exclude military physical security operations. Prior to its attempts to integrate the House and Senate versions of the Act, the Senate bill included certain exemptions for "investigative information" and "law enforcement intelligence information."¹⁰⁸ The "investigative information" exception was limited, by definition, to (1) a criminal investigation of a specific criminal act within the statutory jurisdiction of the agency; or (2) an investigation by an agency empowered to enforce any federal statute or regulation, the violation of which subjects the violator to criminal or civil penalties. The "law enforcement intelligence information" exception was limited, by definition, to information compiled by law enforcement agencies, which agencies were further defined as "agenc[ies] whose employees or agents are empowered by State or Federal law to make arrests for violations of State or Federal law."¹⁰⁹ The military has no explicit arrest authority for the purposes of physical security operations.¹¹⁰

The phrase "law enforcement" also appears in three subsections of the Act other than subsection (e)(7): subsections (b)(7), (j)(2), and (k)(2). In each of these subsections, the phrase "law enforcement" is used in a similar manner—that is, to

¹⁰⁷ Representative Ichord made the following statement:

In referring to a "law enforcement activity" and "law enforcement purposes," I am, of course, using the expression "law enforcement" in its general meaning and in the broadest reach of the term. I include within that term those purposes and activities which are authorized by the Constitution, or by statute, or by the rules and regulations and the executive orders issued pursuant thereto. Thus, investigatory material maintained shall include, but not be limited to, that which is compiled or acquired by any federal agency [for personnel security or access to classified information purposes].

120 CONG. REC. 36,651 (1974). He continued, stating, "It is really to make certain that political and religious activities are not used as a cover for illegal or subversive activities ... [but there is] no intention to interfere with the first amendment rights of citizens." *Id.* at 36,957.

¹⁰⁸ S. 3418, 93d Cong., 2d Sess. § 203(a), 203(b) (1974) (introduced and referred to the Senate Committee on Government Operations, May 1, 1974), reprinted in Source Book on Privacy, *supra* note 93, at 97.

¹⁰⁹ Source Book on Privacy, *supra* note 93, at 97.

¹¹⁰ See *infra* note 130 and accompanying text.

describe limited exceptions to the privacy protections afforded by the Act. The meaning of "law enforcement," therefore, should be interpreted in a consistent manner throughout the Act. Although subsections (b)(7) and (j)(2) turn out to be of little help in the interpretation process,¹¹¹ subsection (k)(2) is interesting.

Section (k) allows certain agencies to exempt certain records from many substantive provisions of the Privacy Act. Subsection (k)(2) covers "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2). . . ." According to the OMB, subsection (k)(2)

allows agency heads to exempt a system of records compiled in the course of an investigation of an alleged or suspected violation of civil laws, including provisions of the Uniform Code of Military Justice and associated regulations. . . . The phrase "investigatory material compiled for law enforcement purposes" is the same phrase as opened exemption 7 to the [Freedom of Information Act] prior to its recent amendment. . . . The case law which had interpreted . . . "law enforcement purposes" for the now amended portions of exemption (b)(7) of the FOIA should be utilized in defining those terms as they appear in subsection (k)(2) of the Privacy Act.¹¹²

Exemption 7 of the Freedom of Information Act (FOIA)¹¹³ was amended¹¹⁴ at approximately the same time as, and by the same committees that wrote, the Privacy Act.¹¹⁵ The FOIA amendments put "lawful national security intelligence investigations"

"Section 552a(b) allows for the dissemination of a Privacy Act record only under limited circumstances. Subsection (b)(7) describes one of those circumstances as follows: "for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency has made a written request [for the record]" Neither the legislative history, nor the OMB Guidelines, nor the case law interpreting this section focus on the specific meaning of law enforcement in this context. With regard to the case law, plaintiffs who assert a violation of this section invariably focus on the absence of a written request from the agency in receipt of the record. *See, e.g., Doe v. Digenova*, 779 F.2d 74 (D.C. Cir. 1985). Defendants who are asserting proper release, on the other hand, usually rely on a different exception to justify release. *See, e.g., Covert v. Harrington*, 876 F.2d 1989 (9th Cir. 1989) (reliance on routine use exception). Section 552a(j) allows some agencies to exempt certain records from most substantive provisions of the Privacy Act, including provisions requiring accounting for disclosures, permitting access by the subject of the record, and restricting the types of information that may be collected and maintained. Subsection (j)(2), however, is limited to records related to the enforcement of the criminal laws.

¹¹²OMB Guidelines, *supra* note 105, at 28,972-973.

¹¹³5 U.S.C. § 552 (1988).

¹¹⁴Freedom of Information Act Amendments, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

¹¹⁵These committees were the House and Senate Committees on Government Operations.

within the scope of "law enforcement purposes."¹¹⁶ The legislative history of the FOIA amendments indicates that the phrase "national security" was intended to include "military security."¹¹⁷

Notwithstanding the intentions of some of the legislators who worked on the Act, "national security intelligence" does not necessarily encompass "physical security intelligence." The phrase "national security" is ambiguous and may be limited to protection against threats emanating from foreign entities or domestic groups desiring the overthrow of the government.¹¹⁸ Additionally, at least one court specifically has rejected the application of FOIA usages to Privacy Act terms on the grounds that the two statutes have radically different purposes.¹¹⁹

(c) *Case Law Addressing Subsection (e)(7)*.—No federal court has had occasion to interpret subsection (e)(7) in the context of a physical security intelligence operation. The cases that have interpreted subsection (e)(7), however, can be divided into two categories. The first category involves complaints against the FBI and the Internal Revenue Service (IRS)—federal agencies that are empowered to enforce specific federal statutes or regulations

¹¹⁶5 U.S.C. § 552(b)(7)(D) (1988).

¹¹⁷The Joint Explanatory Statement of the Committee of Conference noted the following:

Likewise, "national security" is to be strictly construed to refer to military security, national defense, or foreign policy. The term intelligence in section 552(b)(7)(D) is intended to apply to positive intelligence gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such investigations.

S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 7 (1974), *reprinted in* 1974 U.S.C.A.N. 6285, 6291.

¹¹⁸Courts have used the phrase inconsistently. The Supreme Court has used the phrase "national security function" in connection with information gathering on domestic radical organizations. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985). The phrase, however, may be limited in the domestic context to attention rendered to groups that espouse the overthrow of the government. *See, e.g., United States v. United States District Court*, 407 U.S. 297, 309 n.8 (1972) (holding that the Fourth Amendment requires prior judicial approval of certain wiretap techniques in certain national security investigations). "National Security" will generally be used interchangeably with 'foreign security,' except where the context makes it clear that it refers both to 'foreign security' and 'internal security'." *Zweibon v. Mitchell*, 516 F.2d 594, 613 n.42 (D.C. Cir. 1975), *cert. denied* 425 U.S. 944 (1976). The executive branch has used "national security" in the foreign threat context. *See Exec. Order 12,333*, 46 Fed. Reg. 59,941 (1981).

¹¹⁹*MacPherson v. Internal Revenue Serv.*, 803 F.2d 479, 482 (9th Cir. 1986). *But see Clarkson v. Internal Revenue Serv.*, 678 F.2d 1368, 1374 n.10 (11th Cir. 1982) (analogizing the law enforcement provisions of the FOIA and Privacy Act). *Clarkson* may be the better approach. Although the Privacy Act and the FOIA have different purposes, narrow interpretations of "law enforcement" facilitate both the purpose of the Privacy Act—that is, restricting the type of personal information that may be retained by the agency—and the purpose of the FOIA—namely, by increasing the amount of information available to the public.

arguably relevant to the investigation in question.¹²⁰ The courts in these cases did not ponder whether the investigations were “authorized law enforcement activities,” but, rather, whether the information collected was “pertinent to and within the scope” of those law enforcement activities.¹²¹

The second category of cases involved the collection and maintenance of information on the conduct of employees. In each employee conduct case, the court found that no subsection (e)(7) violation had occurred, concluding either that the record complained of contained no information describing how the employee engaged in an activity protected by the First Amendment,¹²² or concluding that tracking employee conduct and performance fell within the law enforcement activity exception.¹²³ The sole support for the latter proposition was Representative Ichord’s reference to “personnel security” in his statement.¹²⁴ Moreover, in each of these cases, the court declined to consider the legislative history from the Senate, although one court did note that the employee-employer relationship was special and closer scrutiny would be given to any collection of information on nonaffiliated persons.¹²⁵

¹²⁰ See 18 U.S.C. § 533 (1988) (authority of the Attorney General to appoint officials, such as Director of the FBI, to detect and prosecute crimes against the United States); 26 U.S.C. §§ 7601-7612 (1988) (authority of Internal Revenue Service to investigate tax matters and perform other enforcement functions).

¹²¹ See, e.g., *Patterson v. Federal Bureau of Investig.*, 893 F.2d 595 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 48 (1990) (FBI case); *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (FBI case); *MacPherson*, 803 F.2d at 479; *Clurkson*, 678 F.2d at 1368.

¹²² See *Pototsky v. Department of the Navy*, 717 F. Supp. 20 (D. Mass. 1989); *Reuber v. United States*, 829 F.2d 133 (D.C. Cir. 1987).

¹²³ See *Nagel v. U.S. Dep’t of Health, Educ., and Welfare*, 725 F.2d 1438 (D.C. Cir. 1984); *American Fed’n of Gov’t Employees (AFGE) v. Schlesinger*, 443 F. Supp. 431 (D.D.C. 1978).

¹²⁴ *Nagel*, 725 F.2d at 1438; *AFGE*, 443 F. Supp. at 435.

¹²⁵ In *Nagel*, the District of Columbia Circuit held that derogatory information in an employee’s file, even if arguably covered by the First Amendment, was within the section 552a(e)(7) law enforcement exception because “[a]n employer’s determination whether an employee is performing his job adequately constitutes an authorized law enforcement activity under Section (e)(7).” *Nagel*, 752 F.2d at 1441. The court in *Nagel* reasoned that law enforcement was more than a criminal concept. The court further stated that “if an agency compiles records describing the exercise of first amendment rights by an individual who is not an employee of that agency, it is unlawful unless there is some other basis which renders the information relevant to an authorized criminal investigation or to an authorized intelligence or administrative one.” This latter language is traceable to *Jabara v. Webster*, 691 F.2d 272, 280 (6th Cir. 1982). The Sixth Circuit in *Jabura* determined that the district court’s limitation of the law enforcement exception to investigation of “past, present, or future criminal activity” was too narrow, and adopted, without explanation, the FBI’s proposed phrasing “relevant to an authorized criminal investigation or to an authorized intelligence or administrative one.” *Id.* at 280. Because *Jabara* involved the FBI—a criminal investigative agency—the quoted language is dicta to the extent that “intelligence” investigation implies something apart from a criminal investigation.

Consequently, the legislative history of the law enforcement exception is ambiguous and the case law addressing the exception is unhelpful. Nevertheless, physical security intelligence operations should fall within the scope of the Privacy Act's law enforcement exception for several important reasons.

First, consider the plain meaning of the term, "law enforcement." The term implies an intent to enforce some positive law. The purpose of physical security functions, however, is primarily protective. Off-post demonstrations that might disrupt military activities do not necessarily involve violations of law within military jurisdiction,¹²⁶ nor may they necessarily encompass criminal violations of any federal law.¹²⁷

Additionally, the use of the root "force" within "law enforcement" implies a prerogative to use force. Actually, various definitions and usages of law enforcement equate law enforcement authority with specific powers—such as the powers to execute searches, to seize evidence, or to make arrests¹²⁸—in connection with violations of specific laws within the jurisdiction of the one asserting the authority.¹²⁹ In conducting physical security

¹²⁶*Compares* AR 380-13, *supra* note 9, para. 6a (authorizing information gathering precedent to an off-post demonstration) *with* AR 380-13, *supra* note 9, para. 3b(6) (stating that AR 380-13 is not applicable to "authorized criminal investigations and law enforcement intelligence activities"). The provisions of DOD *Dir. 5200.27* also categorize intelligence operations involving demonstrations as separate from the investigation and prosecution of crimes within the jurisdiction of DOD. *Compare* DOD *Dir. 5200.27*, *supra* note 34, para. D.1.d. *with id.* para. D.1.g.

¹²⁷Conspiracy to use force in impeding federal government functions is prohibited by 18 U.S.C. § 2384 (1988) (Seditious Conspiracy). If no conspiracy or use of force occurs, a violation of federal criminal law may not even occur. To the extent that a federal law might be violated, the FBI—not the DOD—has specific responsibility to investigate and take further action. *See* Department of Justice et al., Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (August 1984), *reprinted in* DEPT' OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 2-7 (25 Jan. 1990).

¹²⁸*See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2680 (1988) (defining law enforcement officer as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of federal law"); Age Discrimination Act, 29 U.S.C. § 630 (1980) (defining law enforcement officer as one whose duties are "primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against criminal laws of the state"); 26 U.S.C. § 7608(a) (1988) (authorizing Internal Revenue Service "enforcement officers" to execute searches, make seizures, and make arrests); *see also* AR 381-10, *supra* note 38, app. A, para. 18 (defining "law enforcement activities").

¹²⁹*See supra* note 128 and accompanying text. The Army has created a blanket "law enforcement" routine use for privacy act records, but "[t]he agency to which the records are referred must be the appropriate agency charged with the responsibility of investigating or prosecuting the violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto." AR 340-21, *supra* note 54, para. 3-2a; *see also* Lamont v. Department of

operations, however, the military has no arrest, search, or seizure powers, at least as to incidents that occur off post.¹³⁰

In essence, the military's right to conduct physical security operations is the same self-defense right shared by all persons and entities. To equate preparations for self-defense with law enforcement would enable all persons and organizations to label their security functions as "law enforcement" and their security personnel as "law enforcement officers." Furthermore, any insistence that physical security intelligence operations are "law enforcement activities" risks labeling such operations as violative of the Posse Comitatus Act. The Posse Comitatus Act provides as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.¹³¹

Significantly, the military's prerogative to conduct physical security or protective functions is not authorized expressly by Congress or the Constitution,¹³² nor is it the subject of any

Justice, 475 F. Supp. 761, 773 (S.D.N.Y. 1979) (discussing the FOIA exemption for investigatory records compiled for law enforcement purposes). Records of general information gathering for monitoring purposes are not compiled for law enforcement purposes except when the agency's purpose for holding and using the records becomes "substantially violation-oriented." *Lamont*, 475 F. Supp. at 773.

¹³⁰ See DEP'T OF ARMY, PAMPHLET 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 2-19 (15 Mar. 1992). "Short of a declaration of martial law, [the military] remains subordinate to civilian authorities — it does not become an independent law enforcement body. In the absence of a declaration of martial law, the military does not even have a power to arrest which is any more extensive than that of the ordinary citizen." *Report on Military Surveillance*, *supra* note 7, at 108. In addition, 10 U.S.C. § 809(e) (1988), and 18 U.S.C. § 1382 (1988), have been cited as implied authority to conduct searches, seizures, and arrests of civilians, but only for civilians on post. *United States v. Banks*, 539 F.2d 14 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976) (holding that the Posse Comitatus Act does not prohibit military personnel from acting on on-base criminal violations committed by civilians).

¹³¹ 18 U.S.C. § 1385 (1988).

¹³² The authority to protect military functions, wherever they are conducted, exists only in implied form. For example, the Secretary of the Army is responsible for "the functioning and efficiency of the Department of the Army," 10 U.S.C. § 3013(c)(1) (1988), and is responsible to issue regulations "for the government of his department, . . . and the custody, use, and preservation of its records, papers, and property," 5 U.S.C. § 301 (1988). The Supreme Court has cited an inherent authority in the commander, perhaps implied from the Constitution, to maintain order and discipline on a military reservation. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). Certain statutes also have been cited as implied authority for military security and law enforcement operations on post. *See Banks*, 539 F.2d at 16. Despite the lack of a security mission expressly authorized by the Constitution or by an act of Congress, Army regulations state that the Posse Comitatus Act is

executive order addressing intelligence operations.¹³³ Accordingly, even if security operations are “law enforcement activities,” whether those operations are “authorized” as specifically required by subsection (e)(7) is still questionable.

If military physical security operations are “authorized law enforcement activities,” the remaining issue is whether maintenance of information on nonaffiliated civilians is pertinent to, and within the scope of, that activity. Most courts that have considered this issue have decided that any information that is relevant to the law enforcement activity satisfies the requirement.¹³⁴ The Eleventh Circuit, however, applies a tougher standard. It requires the information to be connected to an investigation of past, present, or anticipated violations of statutes that the investigating agency is authorized to enforce.¹³⁵

2. Subsection (e)(1).—“Each agency that maintains a system of records shall . . . maintain in its records only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.”¹³⁶ Agencies may choose to exempt some records from this requirement.¹³⁷ The DA, however, has not claimed any such exemption for its physical security intelligence systems of records.

Subsection (e)(1) imposes more than a relevancy standard. It actually requires a conscious decision to be made that the information in question is required to meet the needs of an

inapplicable to security operations. DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT, para. 3-5 (1 July 1983) [hereinafter AR 500-51].

¹³³Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981) (discussing security in the context of protection against foreign threats).

¹³⁴See, e.g., *Jabara v. Webster*, 691 F.2d 272, 280 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983); *MacPherson v. Internal Revenue Serv.* 803 F.2d 479 (9th Cir. 1986).

¹³⁵*Clarkson v. Internal Revenue Serv.*, 678 F.2d 1368, 1378 (11th Cir. 1982) (citing *Jabara v. Kelley*, 476 F. Supp. 561, 581 (E.D. Mich. 1979)). *Jabara v. Kelley* was the first federal court opinion to consider the application of subsection (e)(7). After *Clarkson* was decided, *Jabara v. Kelley* was reversed on appeal. *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983). *Jabara v. Webster* rejected the specific connection to a past present or future criminal act, and substituted a relevance standard—that is, “relevant to an authorized criminal investigation or an intelligence or administrative one.” *Id.* at 280.

¹³⁶5 U.S.C. § 552a(e)(1) (1988).

¹³⁷See *id.* § 552a(j)(2) (covering certain criminal law enforcement records); *id.* § 552a(k)(2) (covering other investigatory material compiled for law enforcement purposes). Department of the Army has exempted the counterintelligence operations files—at least to the extent that they satisfy the “compiled for law enforcement purpose” requirement. DA PAM. 25-51, *supra* note 98, para. 6-9.

agency.¹³⁸ The legislative history of this subsection indicates that the government must show that maintenance of the information in question is warranted by some “overriding need of society” and that the goal of the government in maintaining the information cannot be met reasonably through alternative means.¹³⁹

Nevertheless, the OMB has interpreted the underlying purpose of the requirement in subsection (e)(1) quite broadly. Its interpretation allows the maintenance of any information made necessary “[b]y the Constitution, a statute, or executive order authorizing or directing the agency to perform a function, the discharging of which requires the maintenance of a system of records.”¹⁴⁰ Under this standard, the Secretary’s statutory power to issue regulations for the “functioning and efficiency of the Army”¹⁴¹ arguably is a sufficient grant of implied authority to maintain information gathered incident to physical security intelligence operations. Further, the cases do not follow the legislative history in placing the burden on the government to show an overriding government interest and lack of alternative solutions when specific information is challenged under subsection (e)(1). Instead, the plaintiff apparently is required to demonstrate that the information collected and maintained is “irrelevant” or “unnecessary” to the function in question.¹⁴² This relaxed relevancy standard weakens subsection (e)(1) as an effective limit on the type of information collected for physical security intelligence purposes.

3. Enforcement. —The Privacy Act provides for both criminal penalties¹⁴³ and civil remedies.¹⁴⁴ Although criminal violations

¹³⁸*Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, 120 CONG. REC. 40,405 (1974), reprinted in *Source Book* on Privacy, *supra* note 93, at 858, 863. “Information may not be maintained simply because it is relevant; it must be both relevant and necessary.” OMB Guidelines, *supra* note 105, at 28,960.

¹³⁹*Protecting Individual Privacy in Federal Gathering, Use, and Disclosure of Information*, S. REP. No. 1183, 93d Cong., 2d Sess. 46 (1974) (Senate Comm. on Gov’t Operations) (discussing section 201(a)(1) of S.3418, which provided that each federal agency shall collect, solicit, and maintain only such personal information as is relevant and necessary to accomplish a statutory purpose of the agency), reprinted in *Source Book* on Privacy, *supra* note 93, at 151.

¹⁴⁰OMB Guidelines, *supra* note 105, at 28,960.

¹⁴¹10 U.S.C. § 3013(c)(1) (1988).

¹⁴²*See, e.g.,* Reuber v. United States, 829 F.2d, 133(D.C.Cir. 1984). Reuber, the employee of government contractor Litton, challenged the government’s filing and maintenance of a letter of reprimand issued by Litton to Reuber. The *Reuber* court held for the Government, stating the plaintiff failed to demonstrate the information was either “irrelevant or unnecessary.” *Id.* at 139; *see also* Kassel v. Veterans’ Admin., 709 F. Supp. 1194 (D.N.H. 1989) (plaintiff unable to show information was “unnecessary or irrelevant”).

¹⁴³5 U.S.C. § 552a(i) (1988).

¹⁴⁴*Id.* § 552a(g).

are unlikely under the physical security intelligence scenario¹⁴⁵ and aggrieved parties cannot assert claims against individual employees of the United States, the Privacy Act does allow for civil remedies in suits against the United States.¹⁴⁶ Specifically, a plaintiff may sue the United States to recover for the "adverse effects"¹⁴⁷ that he or she experienced because of violations of subsections (e)(1) or (e)(7). In addition, if the named agency "acted in a manner which was intentional or willful," the United States must pay costs, reasonable attorneys fees, and the greater of \$1000 or "actual damages" sustained by the individual.¹⁴⁸

The phrases "adverse effect" and "actual damage" have been construed broadly by the circuit courts. "Adverse effect" includes psychological effects,¹⁴⁹ and extends to fear of an official investigation.¹⁵⁰ "Actual damages" encompass all the ordinary elements of compensatory damages, including damages that are not objectively quantifiable, such as pain and suffering caused by mental distress.¹⁵¹

The meaning of "acted in a manner which was intentional or willful" is less clear. Although a plaintiff does not have to prove that agency personnel actually knew they were violating the Act at the time of the violation,¹⁵² the plaintiff must demonstrate behavior exceeding gross negligence,¹⁵³ or prove that "the agency committed the act without grounds for believing it to be lawful."¹⁵⁴

¹⁴⁵ Subsections (i)(1) and (i)(3) are irrelevant because they address wrongful disclosure and the use of deceit in obtaining information already contained within a Privacy Act record. Subsection (i)(2) provides that an officer or employee who "willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$5000." Investigative files held by the USAINSCOM and local criminal information files meet the subsection (e)(4) publishing requirement. These systems of records are defined so broadly that an installation staff member likely could not create—either knowingly or negligently—a record in the physical security intelligence arena that would not be encompassed within the relevant definition. See DA PAM. 25-51, *supra* note 98, at 37-48.

¹⁴⁶ 5 U.S.C. § 552a(g)(1) (1988).

¹⁴⁷ *Id.* § 552a(g)(1)(D).

¹⁴⁸ *Id.* § 552a(g)(4).

¹⁴⁹ *Parks v. Internal Revenue Serv.*, 618 F.2d 677 (10th Cir. 1980); *Johnson v. Department of the Treasury*, 700 F.2d 971 (5th Cir. 1983).

¹⁵⁰ *Johnson*, 700 F.2d at 973.

¹⁵¹ *Id.* at 974-86. The *Johnson* court analyzed the legislative history of the Privacy Act and concluded that the remedies in the Act were intended to be analogous to those provided for in common-law invasion of privacy. See *Parks*, 618 F.2d at 682-83.

¹⁵² *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987).

¹⁵³ *Id.* at 789; *Britt v. Naval Intelligence Serv.*, 886 F.2d 544, 551 (3d Cir. 1989).

¹⁵⁴ *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984).

4. Discussion.—Although the “relevant and necessary” requirement of subsection (e)(1) may be satisfied by the current regulations,¹⁵⁵ the application of subsection (e)(7)’s proscription against maintaining information on activities that are protected by the First Amendment is problematic. Current physical security intelligence regulations generally make no distinction between personal, political, and other information.¹⁵⁶ The only specific requirement is applicable to MPs—that is, “Information concerning purely political activities, personalities, or activities in which no crime is indicated or suspected, will not be collected, recorded, or reported.”¹⁵⁷ Consequently, the physical security intelligence regulations need to be restructured with an eye toward ensuring compliance with subsection (e)(7).

Given the difficulty with interpreting subsection (e)(7), a challenge to the collection and maintenance of information on activities protected by the First Amendment may fail to show that the agency acted “without grounds for believing it to be lawful.” Although this defense might stop the first plaintiff, it does not justify the Army’s failing to bring the regulations in line with a proper interpretation of subsection (e)(7). Instead, to make the regulations comport properly to the Privacy Act—and, specifically, the limitations in the Act concerning the collection and maintenance of information on individuals who are engaged in protected speech, assemblage, and association—several changes should be considered.

One way to avoid the application of the Privacy Act entirely is to avoid maintenance of information on identifiable persons. Information on individuals that is received, either from military investigators, outside agencies, or other sources, might be screened or summarized in such a way as to remove personal identifiers. Identifying collected data with groups, and not individuals, eliminates the applicability of the Act.¹⁵⁸

¹⁵⁵ See *supra* text accompanying notes 140-142.

¹⁵⁶ Although words such as “essential” and “relevant” are used in the regulations, they are not defined further and leave the interpreter with great discretion. The requirement that no information be collected “based solely on advocacy” is a restriction on *when* information may be collected—not on *what* information may be collected.

¹⁵⁷ AR 190-30, *supra* note 47, para. 3-18a.

¹⁵⁸ Arguably, the described procedure still could result in a technical violation of the Privacy Act. “Maintenance” is defined, for purposes of the Act, as including “collection.” 5 U.S.C. § 552a(a)(3) (1988). If information is collected (received) in a form identifiable with an individual, the mere receipt might be considered as “maintenance of a record,” even if individual identifiers are deleted immediately. Maintenance of a record describing how an individual exercises his or her First Amendment rights violates 5 U.S.C. § 552a(e)(7), even if the record never is placed in a “system of records.” *Albright v. United States*, 631 F.2d 915

The maintenance of some information about individuals may be unavoidable. Persons who are group leaders or instigators may have to be identified and tracked by name. In this case, the legitimate use of the law enforcement exception to the ban on maintaining information on activities protected by the First Amendment may be possible. The Army might, for instance, in connection with a physical security investigation, uncover evidence of a specific past, present, or future violation of the law. This evidence could be forwarded to the applicable law enforcement agency, which then might open an investigation and request further assistance. The Army then could justify its information practices under the law enforcement exception to subsection (e)(7), by accommodating the law enforcement authority of the civilian agency.¹⁵⁹

Some information, however, has so little relevance to any physical security intelligence operation that it could be excluded categorically. Information on personal financial statuses, educational histories, sexual practices, and religious beliefs could be considered for such exclusion.¹⁶⁰

B. Posse Comitatus Act

The Posse Comitatus Act (PCA)¹⁶¹ may affect the interaction between the military and civilian activities. The Army has taken the position that the PCA does not apply to actions undertaken primarily for military or foreign affairs purposes, including physical security operations.¹⁶² Because no express authority to conduct physical security operations exists, how the Army has derived this position from the PCA is unclear.

The Supreme Court has not opined on the extent and limits of the PCA, but lower courts generally have defined it as proscribing actions that are "regulatory, proscriptive, or compulsory" in

(D.C. Cir. 1980). The principal purpose of the Privacy Act, however, is to protect the privacy of individuals. Accordingly, "collection" arguably means "collection with the intent to maintain information in individually identifiable form."

¹⁵⁹*But cf.* *Clarkson v. Internal Revenue Serv.*, 678 F.2d 1368, 1374 (11th Cir. 1982) (stating that the use of the law enforcement exception is limited specifically to investigation of past, present, or anticipated violations of statutes "the agency is authorized to enforce") (emphasis added).

¹⁶⁰*Cf.* DOD DIR. 5200.27, *supra* note 34.

¹⁶¹18 U.S.C. § 1385 (1988); *see supra* notes 131-132 and accompanying text.

¹⁶²AR 500-51, *supra* note 132, para. 3-4a. Specific functions that fall into this category include "actions related to the commander's inherent authority to maintain law and order on a military installation or facility;" and "protection of DOD personnel, DOD equipment, and official guests of DOD." No distinction is made between on-post and off-post functions or activities.

nature.¹⁶³ Congress has authorized specific forms of assistance for counternarcotics efforts and, in so doing, specifically has disapproved the use of military personnel in search, seizure, arrest, or similar activities.¹⁶⁴ This statutory language could be interpreted as implicit approval of the “regulatory, proscriptive, or compulsive” definition of the PCA.¹⁶⁵

To the extent that physical security intelligence operations are passive in nature, they arguably are not “regulatory, proscriptive, or compulsive.” Unless the Army otherwise labels physical security intelligence operations as “law enforcement activities,”¹⁶⁶ the PCA should not prove to be a burden to these operations. Additionally, although the PCA provides for criminal penalties, it is not independent authority for a civil cause of action.¹⁶⁷

VI. The First Amendment

Political groups and individuals—particularly those that protest official government policy—will not take kindly to being investigated by a government agency, such as the Army. If a particular investigative or information storage technique runs afoul of the Privacy Act, or any other statute, the plaintiffs may have a cause of action against the nonconforming agency. The Fourth Amendment also offers protection to individuals against certain investigative techniques. To stop an entire investigation, however, a plaintiff may allege that the very existence of the investigation violates the protestor’s First Amendment rights. Specifically, the party could allege that the mere apprehension of “big brother”¹⁶⁸ watching what he or she does deters him or her from fully enjoying the freedoms of speech, assemblage, and association. Regardless of the asserted need for the government surveillance, such a party likely will assert that the right to

¹⁶³ *Bissonette v. Hague*, 776 F.2d 1384, 1390 (8th Cir. 1985); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D.), *aff’d sub. nom.*, 541 F.2d 1275 (8th Cir.), *cert. denied*, 430 U.S. 970 (1975).

¹⁶⁴ 10 U.S.C. § 375 (West Supp. 1991).

¹⁶⁵ Interestingly, when the Army believes the Posse Comitatus Act actually applies, the Army interprets the prohibitions of the Act broadly. For example, if no military function or purpose exists, the Act would preclude the use of military personnel for “surveillance or pursuit of individuals,” or as “informants, undercover agents, investigators, or interrogators.” AR 500-51, *supra* note 132, para. 3-5.

¹⁶⁶ *See supra* notes 131-132 and accompanying text (discussing the law enforcement exception to the Privacy Act’s ban on collection of First Amendment information).

¹⁶⁷ *Bissonette v. Haig*, 800 F.2d 812, 814 (8th Cir. 1986) (*dicta*).

¹⁶⁸ *See Note, Judicial Review of Military Surveillance of Civilians: Big Brother Wears Modern Army Green*, 72 COLUM. L. REV. 1009 (1972).

conduct political activities free from the government's "chilling effects" is paramount.¹⁶⁹

A. Standing

The only case to reach the Supreme Court as a challenge to Army domestic intelligence was *Laird v. Tatum*.¹⁷⁰ In *Laird v. Tatum*, The plaintiffs claimed that the Army investigative system "chilled" their First Amendment rights. The Army prevailed in *Laird u. Tatum* because the plaintiffs failed to allege and prove the necessary injury-in-fact required by the "case or controversy" language in Article III of the Constitution. Any future plaintiff who wishes to mount a judicial challenge based on an Army physical security intelligence operation in court first will have to hurdle the *Laird u. Tatum* barrier. In the twenty years since the Supreme Court spoke in *Laird u. Tatum*, however, judicial gloss has reduced the size and scope of the conditions that a plaintiff must satisfy to assert standing. Analysis of the "law of standing" provides some insight into how internal military guidance for physical security intelligence nevertheless might be structured to raise the *Laird v. Tatum* barrier as high as possible.

[The *Laird v. Tatum* Court] granted certiorari to consider whether . . . respondents presented a justiciable controversy in complaining of a "chilling" effect on the exercise of their First Amendment Rights where such effect is allegedly caused, not by any specific action of the Army against them, but only by the existence and operation of the intelligence gathering and distribution system, which is confined to the Army and related agencies.¹⁷¹

The *Laird v. Tatum* court characterized the plaintiff's allegation of "chill" as "subjective," which, under Article III, was not an adequate substitute for "a claim of specific present objective harm or a threat of specific future harm."¹⁷²

Unfortunately, the *Laird u. Tatum* opinion is ambiguous and has been interpreted in many different, and often contradictory, ways. For example, courts differ on their conclusions as to whether *Laird u. Tatum* applies to plaintiffs who are specific

¹⁶⁹The use of the term "chill" in the First Amendment context has been traced to *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (noting the inhibiting effect of loyalty oaths). See Schauer, *Fear, Risk, and the First Amendment: Unraveling the 'Chilling Effect'*, 58 B.U.L. REV. 685, 685 n.1 (1978).

¹⁷⁰408 U.S. 1 (1972).

¹⁷¹*Id.* at 3.

¹⁷²*Id.* at 13-14.

targets of investigation.¹⁷³ Similarly, they differ as to whether *Laird v. Tatum* applies to investigations that go beyond publicly available sources.¹⁷⁴ Finally, courts disagree as to whether *Laird v. Tatum* mandates that the alleged government action be “regulatory, proscriptive, or compulsory” to satisfy the minimum requirements of “chilling effect” required for standing.¹⁷⁵

To avoid the difficult standing barrier of *Laird u. Tatum*, lower courts simply may recharacterize “chill” as “censorship,”¹⁷⁶ or decide that the entire “holding” of *Laird u. Tatum* is meaningless dicta.¹⁷⁷ Radically different interpretations of *Laird u. Tatum* may stem from the lack of principle underlying the *Laird v. Tatum* holding. Article III of the Constitution limits the jurisdiction of the courts to “cases or controversies.” This constitutional limitation historically has required that the plaintiff show, among other things,¹⁷⁸ that “he [or she] personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.”¹⁷⁹ Historically, the

¹⁷³*Compare* Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989) (the *Laird v. Tatum* plaintiffs alleged only that they “conceivably” could become subject to the Army’s domestic surveillance program) with *Tatum v. Laird*, 444 F.2d 947, 954 n.17 (D.C. Cir. 1971) (“The record shows that most if not all of the appellants and organizations of which they are members have been the subjects of Army surveillance and their names have appeared in the Army’s records”).

¹⁷⁴*Compare* Donohoe v. Dowling, 465 F.2d 196, 199 (4th Cir. 1972) (*Laird v. Tatum* characterized as involving clandestine methods, infiltration, and sophisticated electronics) with *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 769 (S.D.N.Y. 1972) (*Laird v. Tatum* characterized as involving passive intelligence gathering from open and public sources).

¹⁷⁵*Compare* United Presbyterian Church v. Reagan, 738 F.2d 1375, 1379 (D.C. Cir. 1984) (citing *Laird v. Tatum* for the proposition that lack of regulatory, proscriptive, or compulsive exercise of government power precludes any possibility of standing based on “chill”) with *Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1318 (1974) (Marshall, Circuit J.) (the proposition that *Laird* requires some regulatory, proscriptive, or compulsive exercise of power is incorrect; the Court in *Laird* was simply distinguishing past cases where such power was exercised).

¹⁷⁶*Keene v. Meese*, 619 F. Supp. 1111, 1117 (E.D. Cal. 1985), *rev’d on other grounds*, 481 U.S. 465 (1987).

¹⁷⁷The Court’s opinion in *Laird v. Tatum* noted the plaintiffs’ apparent concession that they themselves were not chilled. *Laird v. Tatum*, 408 U.S. at 13-14. “This concession, if accepted, would leave the Court only with claims that the government action was unlawful, not that anyone before the Court had been ‘injured in fact’ in any sense.” The lack of actual chill to the *Laird v. Tatum* plaintiffs renders any subsequent discussion of types of chill irrelevant to the case. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-16, at 122 (2d ed. 1988).

¹⁷⁸The plaintiff also must show that the injury fairly can be traced to the challenged activity of the defendant, and that the injury likely will be redressed by the requested relief. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

¹⁷⁹*Valley Forge Christian College*, 454 U.S. at 472.

Supreme Court has connected the “injury-in-fact requirement” to the “case or controversy” provision by reasoning that actual injury motivates the plaintiff to litigate, which ensures adequate presentation of the case.¹⁸⁰

“Injury in fact” includes physical, monetary, and psychological injuries. Standing not only arises from injuries that are past or present, but also may result from anticipated injuries.¹⁸¹ Logically, the plaintiff who is alleging threatened injury, rather than actual injury, is motivated by a present fear of future injury. This is the impetus that motivates a plaintiff in a chilling effect case—fear that misuse of information gathered, or even just the knowledge of being a government target, will result in loss of employment, loss of security clearance, or loss of reputation. The only difference between a chilling effect case and other anticipated injury cases is that, in the former, the plaintiff cannot say exactly what the government might do; instead, the plaintiff can give only a long list of possible future injuries. Accordingly, the relatively intangible apprehensions asserted by a plaintiff in a chilling effect lawsuit may be different in degree than the fears alleged by a party who can point to a specific threatened injury. Nevertheless, the Supreme Court has acknowledged that the plaintiff in a chilling effect case has no less standing to sue than does a plaintiff who is able to specify a feared injury with particularity. Consequently, notwithstanding the understandable first impression from a chilling effect case—that is, the plaintiff’s fears are just too speculative—by satisfying the requirements for Article III standing, a plaintiff normally will have made a sufficient showing of potential harm to prevent the allegation from being excluded categorically.¹⁸²

Laird v. Tatum presents another philosophical problem. Once the minimum Article III standing requirements are satisfied, the courts often look to other prudential factors when deciding whether to consider the merits of a particular case. The

¹⁸⁰ See *Baker v. Carr*, 369 U.S. 186, 204 (1962).

¹⁸¹ See *TRIBE*, *supra* note 177, § 3-16.

¹⁸² See, e.g., *Lamont v. Postmaster General*, 381 U.S. 301 (1965). Plaintiff *Lamont* challenged a statute directing the Post Office to detain “communist propaganda” mail until the addressee made a request for delivery. The Court accepted the plaintiffs’ assertions of standing. The Court found the statute to impose an unconstitutional First Amendment infringement because those who read such material “might think they would invite disaster if they read what the government says contain the seeds for treason.” *Id.* at 307. *Laird v. Tatum* distinguished *Lamont* on the grounds that, in *Lamont*, the government actually required the plaintiff to do something—namely, make a request for mail material. The injury, however, is not making the request but, instead, the fear of what the government will do with a list of those who desire communist propaganda. *Lamont* is not distinguishable from *Laird v. Tatum* in this sense.

Laird v. Tatum opinion fails to address an important consideration¹⁸³ that supports justiciability and is present in all chill cases. The First Amendment is not just another coequal element of the Bill of Rights. Rather, the First Amendment “transcends”¹⁸⁴ the other nine amendments by protecting both individual and societal interests. To the extent that the government limits, or attempts to limit, an individual’s right to free speech, assemblage, or association, society also is injured. The free exchange of information is actually necessary to the basic functioning of a democratic form of government.¹⁸⁵ By arbitrarily excluding plaintiffs who allege a subjective “chilling effect,” *Laird v. Tatum* runs counter to the historically expansive consideration of First Amendment interests.¹⁸⁶

These concepts shed some light on the willingness of certain *post-Laird v. Tatum* decisions to stretch *Laird v. Tatum*’s facts and findings to derive standing. Two Supreme Court decisions are particularly important. First, in *Socialist Workers Party v. Attorney General*¹⁸⁷ (*Socialist Workers Party III*), decided shortly

¹⁸³ Given the Court’s conclusion in *Laird v. Tatum*, that the plaintiffs lacked Article III standing, any discussion of prudential standing factors would have been dicta. Nevertheless, the Court did mention its concern that judicial review covering the Army’s extensive intelligence activities of the period would leave the “federal courts as virtually continuing monitors of the wisdom and soundness of Executive action.” *Laird v. Tatum*, 408 U.S. at 15. One commentator suggested that the Court was leery of becoming involved in such a sensitive and complex political issue and that the “political question” doctrine is the best explanation for the *Laird v. Tatum* decision. Note, *supra* note 168, at 1027-28. Of course, the political question doctrine would be of less importance to a legal challenge involving a specific incident at the installation level.

¹⁸⁴ *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

¹⁸⁵ See TRIBE, *supra* note 177, § 12-1 (discussing historical and judicial precedents supporting the necessity of free speech to individual fulfillment and stable government).

¹⁸⁶ For example, in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985), the Court—in discussing the “overbreadth doctrine”—noted the following:

[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

See also *Board of Comm’rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) *Lamont* is a de facto case of representation of third-party interests in a First Amendment context. See *Lamont*, 381 U.S. at 301. The only harm to *Lamont* was the requirement that he identify himself to the Post Office as interested in “propaganda” materials. By bringing suit, however, he was telling the world that he was interested in those materials and thus exacerbating—not remedying—the potential personal harm. The only rights that he could have vindicated by his suit were the rights of third parties and society in general. See Note, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 *STAN. L. REV.* 196, 204 (1970).

¹⁸⁷ 419 U.S. 1314 (1974) (Marshall, Cir. J.).

after the decision in *Laird v. Tatum*, Justice Marshall considered a federal appeals court decision enjoining the FBI from monitoring a national convention of the Young Socialist Alliance. In determining that the plaintiffs had standing under the First Amendment to challenge the FBI's surveillance, Justice Marshall distinguished *Socialist Workers Party III* from *Laird v. Tatum* by pointing out that the alleged surveillance in *Socialist Workers Party III* had the "concrete effects of dissuading some delegates from participating actively in the convention and leading to possible loss of employment. ... [W]hether claimed chill is substantial or not is a matter to be reached on the merits."¹⁸⁸

The injuries cited by the plaintiffs in *Socialist Workers Party III*, however, are difficult to distinguish from the injuries alleged in *Laird v. Tatum*. The plaintiffs in *Laird v. Tatum* asserted that their associational rights had been injured because the Army's surveillance had deterred others from talking to them. Additionally, the plaintiffs in *Laird v. Tatum* complained that their future employment opportunities might be restricted. The only difference between the two cases—at least, as reflected in the facts as stated in the judicial opinions—was that the Army admitted to providing its information only to "related civilian investigative agencies," while the FBI specifically admitted to providing its information to the federal agency that made federal employment decisions. Because the FBI was one of the Army's "related civilian investigative agencies" for domestic intelligence purposes,¹⁸⁹ this difference amounted to a superficial distinction. The different outcomes in *Socialist Workers Party III* and *Laird v. Tatum* rationally can be distinguished in only two ways: by taking cognizance of the differences in pleadings between the two cases or by interpreting *Laird v. Tatum* in a manner that ignores the *Laird v. Tatum* facts.

In *Meese v. Keene*,¹⁹⁰ a 1987 Supreme Court decision, the Court further limited the effective reach of *Laird v. Tatum*. Plaintiff Keene, a California state representative, wanted to show three films produced in Canada. The Justice Department, in accordance with statutory authority, determined that the films were "political propaganda." This determination created a further requirement for placing a label at the beginning of each film, identifying briefly its source and the party who had produced it. Keene objected to the labeling process, claiming that the "political propaganda" determination chilled his First Amendment right to display the films. He claimed fear of injury to his reputation and

¹⁸⁸ *Id.* at 1319.

¹⁸⁹ See Report on Military Surveillance, *supra* note 7, at 52.

¹⁹⁰ 481 U.S. 465 (1987).

injury to subsequent employment prospects. As proof, he submitted affidavits and the results of a poll showing that his constituents would be less likely to vote for a candidate that displayed films labeled as "political propaganda" by the government. The Supreme Court found unanimously that the allegations of reputational injury stemming from showing such films were sufficient for standing purposes.¹⁹¹

Not surprisingly, the lower courts have taken notice. The most recent surveillance cases¹⁹² have decided the standing issue in favor of the plaintiff. In *Riggs v. City of Albuquerque*,¹⁹³ the Tenth Circuit found standing, based only on the following pleading by the plaintiff:

Defendants' [investigative] actions and [the investigative activities] of their agents have caused and continue to cause a chilling effect on plaintiffs' first amendment association and free expression rights, the effect of which causes harm to plaintiffs beyond subjective fear, *including but not limited to injury to personal, political, and professional reputations.*¹⁹⁴

The *Riggs* opinion does not indicate how this injury supposedly occurs, nor does it specify what proof, if any, the plaintiff was required to submit.

Preferably, physical security intelligence operations should be conducted in a manner that attenuates manifestations of "chilling effect" sufficiently to diminish a plaintiff's ability to demonstrate standing. The current physical security intelligence regulations, in particular, can be modified in two ways to raise

¹⁹¹*Id.* at 472, 486. One commentator made the following remark on the direct connection between *Keene v. Meese*, *Laird v. Tatum*, and Army surveillance: "An opinion poll asking about those under surveillance by the U.S. Army would surely reveal that such government activity seriously threatens reputations." Jonathan R. Siegal, Note, *Chilling Injuries as a Basis for Standing*, 98 *YALE L.J.* 905, 909 (1989). *Keene v. Meese* also can be read for the proposition that unsupported allegations of reputational injury can form the requisite basis for standing. After granting Keene his standing, the Court went on to conclude that, because "political propaganda" has a neutral statutory meaning and because the statute actually adds to the amount of information available to the public by requiring that each film be labeled with its source, all that Keene needed to **do to** avoid injury was to discuss the label and its meaning before each film. In other words, any reputational injury was self-inflicted and avoidable.

¹⁹²*Riggs v. City of Albuquerque*, 916 F.2d 582 (10th Cir. 1990) (challenge by political activists and politically active organizations to surveillance by city police department); *The Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) (challenge by churches to surveillance of church services in connection with investigation of the sanctuary movement by the Immigration and Naturalization Service).

¹⁹³*Riggs*, 916 F.2d at 582.

¹⁹⁴*Id.* at 585.

the standing barrier that a plaintiff must hurdle. First, the military can conduct its surveillance operations in a more circumspect and covert manner. Second, it can place additional restrictions on the dissemination of information that is collected and retained.

The current regulations generally are silent on whether an investigative activity should be overt or covert. When a distinction is made, however, the regulations favor overt investigations.¹⁹⁵ Although Congress has expressed a general preference for open government,¹⁹⁶ national security interests may necessitate the military to conduct covert physical security intelligence operations. By keeping such operations confidential—when doing so is otherwise lawful and proper—the military coincidentally reinforces its legal posture. For instance, a person who is unaware of an investigation may never realize that he or she is a potential plaintiff. Specifically, if an individual knows nothing of ongoing investigative activities, he or she logically cannot found an assertion of standing on a “chilling effect” theory. In addition, if the investigation is discovered only after the subject activity has transpired, a plaintiff could assert standing only as to a claim for damages and expungement of files. Likewise, an injunction against future surveillance activities may be beyond the plaintiffs reach.¹⁹⁷ Furthermore, the overt presence of investigators may aggravate the injury posed by the alleged chilling effect. As third parties become aware that certain persons are under surveillance, the third parties may refuse to become involved with the targeted persons out of fear of similar government attention. Alternatively, third parties currently involved with targeted persons may terminate their existing relationships—including employment arrangements—on the theory that the targeted persons would not be subject to government investigation unless they had undesirable information to hide or had been involved in wrongdoing. Moreover, because overt surveillance may be used to deter otherwise lawful political activity, and courts may view overt military surveillance as evidence of a bad-faith purpose, even

¹⁹⁵ See DOD DIR. 5200.27, *supra* note 34, para. E.5; AR 380-13, *supra* note 9, para. 9d; AR 381-10, *supra* note 38, procedure 10, para. C.

¹⁹⁶ See, e.g., The Freedom of Information Act, 5 U.S.C. § 552 (1988); The Government in the Sunshine Act, Pub. L. No. 94-049, 90 Stat. 1241 (1976).

¹⁹⁷ See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). After Lyons was injured seriously by a police chokehold, he sued for damages and an injunction restricting the further use of the chokehold. The Court denied that Lyons had standing to request injunctive relief because he likely would never be attacked again in the same manner. Similarly, if a protest is local, surveillance is local. Accordingly, because the specific conditions precipitating an investigation dissipate prior to a plaintiffs request for relief, a protestor effectively may have no standing to enjoin future Army surveillance.

when the military actually had a good-faith physical security purpose in obtaining the subject information.¹⁹⁸ Predictably, such evidence of bad faith increases the likelihood that a court will find standing.¹⁹⁹

Surveillance activities can become "overt" in various ways, almost invariably creating negative results for the investigators. Several cases cite the purposeful transfer to third parties of information gained through surveillance as unreasonable.²⁰⁰ Another case points out that the intentional disclosure that the plaintiffs were targets of police surveillance was sufficient to create standing if no lawful purpose existed.²⁰¹ In another case, *Paton v. LaPrade*,²⁰² a high-school student working on a school project sent for some information from the Socialist Workers Party (SWP). The FBI received the student's name from the Postal Service pursuant to a standing mail cover²⁰³ on SWP mail. An FBI agent went to the student's school where, after speaking with her principal and vice principal, the agent discovered plaintiff's educational purposes, which apparently led the FBI's closing the case. "News of the investigation spread through her school, her community, and the country."²⁰⁴ Based in part on her new-found notoriety, the student filed a claim against the FBI for violation of her First Amendment rights through stigmatization, even though no evidence existed to show that the FBI had done anything beyond talking with the two school officials. On appeal from the district court's granting summary judgment for the FBI, the Third Circuit found that the plaintiffs allegations were sufficient to sustain her lawsuit and remanded for additional proceedings. The *Paton* case indicates both the importance, and the difficulty, of keeping an operation covert.

¹⁹⁸ *Alliance to End Repression v. Rochford*, 407 F. Supp. 115, 118 (N.D. Ill. 1975); see also *Local 309, United Furniture Workers, C.I.O., v. Gates*, 75 F. Supp. 620 (N.D. Ind. 1948). Police may defend overt surveillance as a deterrent to "violence, vandalism, and this kind of thing." *Donohoe v. Dowling*, 465 F.2d 196, 199 (4th Cir. 1972); *United Furniture Workers*, 75 F. Supp. at 623.

¹⁹⁹ See *Anderson v. Sills*, 265 A.2d 678, 688 (N.J. 1970).

²⁰⁰ See, e.g., *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976); *Philadelphia Resistance v. Mitchell*, 58 F.R.D. 139 (E.D. Pa. 1972); *Rochford*, 407 F. Supp. at 111; *Alliance to End Repression v. Chicago*, 627 F. Supp. 1044, 1047 (N.D. Ill. 1985) (police brought along a newspaper reporter who wrote about surveillance activities).

²⁰¹ *Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335 (3d Cir. 1975) (complaint of violation of Civil Rights Act).

²⁰² *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975).

²⁰³ A mail cover is a procedure involving examination, prior to delivery, of mail addressed to particular addressees. Information on the exterior of the targeted mail, including the sender's address, is recorded and provided to the requesting investigative agency.

²⁰⁴ *Id.* at 870.

The final reason to use covert surveillance in lieu of overt surveillance is the effect that overt surveillance has on the physical security threat. Overt surveillance can be undesirable, not only because of its propensity to chill political activities protected by the First Amendment, but also because it inadvertently may strengthen significant security threats. Overt surveillance simply may alert criminal or militant activists and make them more careful in their planning.

Current physical security intelligence regulations provide for wide latitude in what information can be stored and how it can be used. Nothing in the regulations distinguishes between personal and other information.²⁰⁵ Files are reviewed annually based on a relevance standard, and the local commander has great discretion over what to retain and what to discard.²⁰⁶ Nevertheless, this information's wide availability in the federal government for employment purposes, as well as its habit of becoming available elsewhere to be used for other considerations that are not related to physical security,²⁰⁷ demonstrates that the information is inherently volatile. *Socialist Workers Party III, Meese v. Keene*, and lower court decisions²⁰⁸ indicate that the mere possibility of future employment opportunities being damaged by information disseminated by the surveilling agency may provide a plaintiff with standing to sue. Consequently, the military should consider methods by which it can restrict the use of physical security intelligence to security purposes, and should consider procedures to destroy collected data once the immediate threat is passed.²⁰⁹

B. Substantive First Amendment Claim

Because summary judgments to the defendants in information gathering cases are no longer assured, challenges to government

²⁰⁵ *But cf.* AR 190-30, *supra* note 47, para. 3-18a; *supra* note 53 and accompanying text.

²⁰⁶ *See* AR 380-13, *supra* note 9, para. 8b(2); *supra* note 77 and accompanying text.

²⁰⁷ AR 340-21, *supra* note 54, provides for blanket routine uses that apply to all systems of records except those that specifically state otherwise. These routine uses include, among other things, information relevant to federal agency decisions on hiring, firing, contracting, and security clearances. *Id.* para. 3-2.

²⁰⁸ *See, e.g.*, *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975) (16-year-old plaintiff had standing to attack an FBI investigation because the FBI kept a file on the plaintiff that was available to the Civil Service Commission for federal hiring decisions, and the plaintiff might apply for a government job sometime in the future).

²⁰⁹ *See* *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974). In holding that plaintiffs lacked standing to challenge an FBI investigation, the Second Circuit stressed that the investigation was attempting to gauge the number of persons attending a planned march and the investigators were not recording individual names and other personal information. *Id.*

investigations—including physical security intelligence operations—are likely to reach the merits. Accordingly, lawsuits against the government for engaging in improper information collection practices typically will require the court to rule on the underlying First Amendment issue.

Almost all First Amendment claims allege some form of injury caused by a chilling effect on the petitioner. The allegation, however, may arise in a number of different ways. The most common claim involves a challenge to the validity of a specific statute that prohibits or requires some form of conduct. The plaintiff in such a case typically wants to engage in some activity that is protected by the First Amendment, but claims that the statute has a “chilling effect.”²¹⁰ Another form of injury derives from the chilling effect caused by the government’s collecting information on an activity that is unusual or unorthodox. The Supreme Court has considered many cases in this category, examining the limits of legislative power to investigate alleged subversive activities. All these legislative investigation cases, however, involve some direct application of government’s power to force cooperation—usually in an effort to obtain membership lists or other evidence of association.²¹¹ Finally, “pure surveillance” cases may arise when the government collects information, but projects no regulatory, proscriptive, or compulsive power. Cases that implicate physical security intelligence operations fall into this category. Unfortunately, court decisions providing detailed analytical guidance for pure surveillance cases are few. For this reason, an analysis of this type of case must begin by considering recent, general pronouncements on First Amendment methodology.

In the 1989 case of *Texas v. Johnson*,²¹² the Supreme Court reversed a criminal conviction under a state statute prohibiting

²¹⁰See, e.g., *United States v. Robel*, 389 U.S. 258 (1967) (statute forbidding a member of any “communist action organization” to work in a defense facility found unconstitutional); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (statute criminalizing certain “subversive activities” challenged as chilling legitimate civil rights activities and found unconstitutional).

²¹¹See, e.g., *National Ass’n for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investig. Comm.*, 372 U.S. 539 (1963) (legislative contempt conviction for failing to disclose National Association for the Advancement of Colored People (NAACP) membership lists found to be an unconstitutional infringement of First Amendment rights when the legislature could show no substantial connection between the NAACP and the communist activities being investigated).

²¹²491 U.S. 397 (1989). Although *Johnson* was a five-to-four decision, the general analytic scheme employed by the majority is authoritative. The majority opinion was joined by two of the more liberal members of the Court (Justices Brennan and Marshall) and two of the more conservative members (Justices Scalia and Kennedy). Further, the dissent did not quarrel with the analytical framework used by the majority. *Id.* at 421.

flag desecration.²¹³ The *Johnson* Court set forth a general methodology for analyzing First Amendment claims. The first step is to determine whether the challenged regulation or proscription impacts on (“expressive conduct,”²¹⁴ as distinguished from “nonexpressive conduct.” If the only impact is on nonexpressive conduct, no First Amendment issue arises. A plaintiff’s challenge to the validity of physical security operations, however, almost certainly will cite a chilling effect on “expressive conduct.”²¹⁵

The next step in the *Johnson* methodology is crucial. The Supreme Court stated, “If [the plaintiff’s] conduct [is] expressive, we next decide whether the State’s [activity] is related to the suppression of free expression. . . . [I]f the State’s [activity] is not related . . . , then the less stringent standard we announced in *United States v. O’Brien* for regulations of noncommunicative conduct controls.”²¹⁶ If an activity or regulation is categorized as “related to suppression,” the activity will be subjected to “the most exacting scrutiny.”²¹⁷ Accordingly, avoiding such a review—that is, a review that triggers enhanced standards of judicial scrutiny—will be important to the survival of a regulatory scheme.²¹⁸

The activity is “related to suppression” if it is directed expressly at the communicative part of the conduct or if it otherwise is undertaken because of the communicative element.²¹⁹ The former situation is usually clear from the language of the regulation (or other authority) under which the action is taken, while the latter requires an analysis of the actor’s specific motivation.²²⁰ A physical security intelligence regulation must be crafted carefully to ensure that it neither allows for, nor creates the appearance of, improper motivation on behalf of those who

²¹³See also *United States v. Eichman*, 496 U.S. 310 (1990) (overturning conviction for violating federal statute forbidding flag desecration). The Court’s reasoning in *Eichman* did not vary significantly from its reasoning in *Johnson*.

²¹⁴*Johnson*, 491 U.S. at 403.

²¹⁵Plaintiffs challenging physical security intelligence operations will allege chilling effect having an impact on speech and association, both of which are recognized forms of expressive conduct. Even the harm that the government is trying to prevent or avoid, such as a peaceful blockade or terrorist act, is expressive conduct.

²¹⁶*Id.* at 403.

²¹⁷*Id.* at 412.

²¹⁸The test for a content-based restriction often is described as requiring that the Government show that the regulation is a precisely drawn means of serving a compelling state interest. See *TRIBE*, *supra* note 177, § 12-8, at 833-34.

²¹⁹*Johnson*, 491 U.S. at 407.

²²⁰If a statute or regulation appears to have a neutral purpose on its face, the courts will not examine into the drafter’s actual motive. *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968).

will implement the regulation. Unfortunately, existing regulations are not satisfactory in this regard.

These regulations should be content neutral. In other words, regardless of the political inclinations of the subjects, the focus of any investigation should be on acts that directly affect the security of DOD personnel, property, and functions. Nevertheless, the current regulations have been drafted to permit a decision-maker to authorize an investigation, in whole or part, based on the message of the protestors. The cases, however, indicate that the government's failure to limit the decision-maker's discretion—and, in particular, a failure to limit that official's discretion to content-neutral factors—can be fatal.²²¹

Under *AR 380-13*, a commander may authorize the commencement of physical security intelligence operations only “if there is a reasonable basis to believe that ... demonstrations immediately adjacent to Army installations ... are of a size or character ... that they are likely to interfere with the conduct of military activities.”²²² Unfortunately, none of the significant terms in this provision are defined. An official could conclude that “interference with military activities” is limited to the possibility of physical penetration of the post. The official also could reason that the phrase includes the obstruction of military traffic after it leaves the installation. In addition, he or she could conclude that “interference with military activities” includes any interference—direct or indirect—with the image or the performance of the military. For example, a commander genuinely may determine that the messages conveyed by antimilitary demonstrations occurring near his or her installation will be observed and overheard by some soldiers, thereby affecting discipline and damaging morale. The character of a commander's decision in such a scenario, however, inextricably is related to the content of a constitutionally protected expressive activity. A regulation that allows a commander to found his or her decision to commence physical security operations on the character of speech, rather than on the tangible effect that an activity may have on the military readiness of his or her unit, could place a physical security collection operation under a heightened, strict scrutiny review.

A related problem afflicts both *DOD Directive 5200.27* and *AR 380-13*. These publications specify that the “[s]ubversion of loyalty, discipline, or morale of DOD military or civilian personnel

²²¹ See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Hague v. Committee for Indus. Operations*, 307 U.S. 496 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

²²² *AR 380-13*, supra note 9, para. 6a.

by actively encouraging violation of law, disobedience of lawful order or regulation, or disruption of military activities”²²³ justifies the collection of information on nonaffiliated persons. The same provision also permits the collection of information when the targeted activity involves the “[s]ubversion of... morale ... by actively encouraging ... disruption of military activities.” Again, the meaning of these terms is uncertain, with the potential for misinterpretation and misapplication.²²⁴

The vagueness shared by *AR 380-13* and *DOD Directive 5200.27* is exacerbated through the use of the following language: “No information shall be acquired about a person or organization solely because of lawful advocacy ‘of measures in opposition to U.S. Government policy’”²²⁵ This language implies that lawful advocacy, although not permitted as the sole reason for collecting information, may be a reason for an operation. Accordingly, the approval authority may base a decision to investigate, in part, on the subject’s message and, in part, on the medium that the subject intends to employ to convey the message. Two federal courts have struggled in interpreting similar language and have been unable to agree on its meaning.²²⁶

The “lawful advocacy” language creates additional confusion within these regulations. “Active encouragement of ... disruption of military activities” is a separate justification for collection operations. If a commander depended on such a justification, however, the authorization to commence physical security operations effectively would be based “solely on lawful advocacy.” In

²²³DOD DIR. 5200.27, *supra* note 34, para. D.1.a.

²²⁴*Id.* para. D.1.c (forming an additional category for “Acts jeopardizing the security of DOD elements”). None of the terms in this category are defined.

²²⁵*Id.*, para. E.2; *AR 380-13*, *supra* note 9, para. 9a.

²²⁶*Compare* *Alliance to End Repression v. City of Chicago (Alliance I)*, 561 F. Supp. 575 (N.D. Ill. 1983) *with* *Alliance to End Repression v. City of Chicago (Alliance II)*, 742 F.2d 1007 (7th Cir. 1984) (reversing *Alliance I*). The plaintiff and the FBI, which was one of the named defendants, had entered into a consent decree. The decree contained the following language: “The FBI shall not conduct an investigation [of the plaintiff] solely on the basis of activities protected by the first amendment.” The FBI subsequently issued national guidelines that covered investigative activities. These guidelines stated, “When, however, statements advocate criminal activity ... an investigation is warranted unless it is apparent ... that there is no prospect of harm.” The plaintiff sought an injunction against the application of these new guidelines to the plaintiffs, complaining that quoted language in the guidelines was violative of the consent decree. The district court agreed with the plaintiffs. *Alliance I*, 561 F. Supp. at 578. The Seventh Circuit, however, did not. *Alliance ZZ*, 742 F.2d at 1020. As summarized by the dissent in the Seventh Circuit’s decision, “While I have found it hard to pinpoint precisely what the majority has held ... I think tentatively that [the language of the decree meant only that] the FBI would decline to conduct an investigation in violation of the constitution, and unconstitutional investigations are those which are motivated solely by an unambiguous desire to suppress a political movement” *Alliance ZZ*, 742 F.2d at 1020 (Cudahy, J., dissenting).

Brandenberg v. Ohio,²²⁷ the Supreme Court considered an Ohio statute that criminalized “advocating ... the duty, necessity, or propriety of crime ... or other unlawful methods ... as a means of accomplishing ... political reform.”²²⁸ The Court held that the government could not criminalize such advocacy—even the advocacy of illegal activity—except when such advocacy “is directed to inciting or producing imminent action and is likely to produce such action.” The current regulations, however, fail to spell out this important caveat, rendering further misapplication of the language, “actively encouragement of ... disruption of military activities,” a likely occurrence.

If a government regulation has a properly defined, content-neutral purpose, Johnson indicates that analysis continues under the “less stringent” standard of *United States v. O’Brien*.²²⁹ *O’Brien* burned his draft card in protest of the draft and was prosecuted under a statute that criminalized knowing destruction or mutilation of a draft card. The Court concluded that the conduct in question—that is, the actual burning of the draft card—was expressive conduct; and that the statute, at least on its face, was content neutral. The Court then stated the following:

To characterize the quality of the government interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²³⁰

A slightly different, and more succinct, methodology was set forth in the Supreme Court’s subsequent decision in *Clark v. Community for Creative Nonviolence (CCNV)*.²³¹ In *CCNV*, the Court considered the constitutionality of United States Park Service regulations that banned overnight camping, as they applied to protest groups who wanted to emphasize the plight of the homeless by sleeping overnight in Lafayette Park. Citing

²²⁷ 395 U.S. 444 (1969).

²²⁸ *Id.* at 444.

²²⁹ 391 U.S. 367 (1968).

²³⁰ *Id.* at 376-77.

²³¹ 468 U.S. 268 (1984).

O'Brien, the Court stated that "symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial government interest, and if the interest is unrelated to the suppression of free speech."²³²

The Supreme Court's decision in *CCNV* is particularly indicative of the direction in which the Supreme Court may be moving on issues concerning substantive First Amendment law because the case is relatively recent and because the opinion represents a consensus of seven justices, including all the justices who dissented in *Johnson*. Both *O'Brien* and *CCNV* emphasize that the government purpose behind the regulation is the paramount consideration and, if the regulation is focused on the government purpose, any attendant abridgement of First Amendment rights is a secondary factor to the analysis. Moreover, the majority in *CCNV* refused to consider various proposed alternative regulations that might have had less impact on expression protected by the First Amendment, stating only that "respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message"²³³

Chilling-effect injuries, however, differ in character from the injuries suffered when a specific form of expression or expressive conduct actually is denied. An injury caused by a chilling effect has no impact on the mode of transmitting a message; rather, it affects the speaker or the audience directly. If the government's regulation does not prohibit a particular form of expression, but government surveillance operations nevertheless make one party afraid to listen to, view the activities of, or associate with, another party, no effective means of transmitting the intended message may exist. The issue becomes whether this difference—that is, actual prohibition by government regulation versus de facto prohibition resulting from the chilling effect of intrusive government activity—is sufficient to require separate First Amendment analyses. The answer is probably not.

A survey of the few court challenges to "pure" surveillance activities is now appropriate. The first significant surveillance case is *Local 309, United Furniture Workers v. Gates*,²³⁴ decided in 1949 by the District Court for the Northern District of Indiana. A labor union, Local 309 of the United Furniture Workers (Local 309), was involved in a contentious strike that, on occasion, resulted in acts of violence. The union held its regular meetings in the county

²³²*Id.* at 294.

²³³*Id.* at 295.

²³⁴75 F. Supp. 620 (N.D. Ind. 1948).

courthouse. Members of the local police, generally considered unfriendly to the union, openly attended the meetings and took notes. The police would not leave when asked. When the union filed suit to enjoin the police surveillance, the police asserted an interest in preventing violence, both at the meetings and at the strike locations. On the basis that no evidence existed to support a connection between the violent acts and the union or its meetings, the district court enjoined the police from further attendance at the meetings. The standard of review chosen by the court, citing the Supreme Court in *Thomas u. Collins*,²³⁵ was the then-prevailing strict scrutiny standard, which held, "Any attempt to restrict those liberties [secured by the First Amendment] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present **danger**."²³⁶

The court's opinion in *Local 309 v. Gates* does not clarify whether the court accepted the police justification—the prevention of violence—at face value, or whether it decided the case on the presumption of improper motive.²³⁷ If the court accepted that the police surveillance was performed in good faith, then applying the strict scrutiny standard of *Thomas* arguably was incorrect because the *Thomas* case involved a direct restraint on speech.²³⁸ Since the decision in *Local 309 v. Gates*, two state courts²³⁹ have used the strict scrutiny analysis in discussing pure chilling-effect cases. In both of these cases, however, the courts also found that the government investigation was not defined properly in terms of legitimate purpose or scope.²⁴⁰

Two cases in which the Supreme Court found standing in connection with chilling-effect injuries provide some insight into how the Court will analyze such claims on the merits. In *Socialist Workers Party u. Attorney General*,²⁴¹ (*Socialist Workers Party I*) Circuit Justice Marshall considered the merits of a requested injunction that would have prevented the FBI from conducting

²³⁵ 323 U.S. 516 (1945) (state statute mandating state registration and approval before labor organizer could solicit memberships held incompatible with the First and Fourteenth Amendments).

²³⁶ *Id.* at 530.

²³⁷ See *Gates*, 75 F. Supp. at 624-25.

²³⁸ *Thomas*, 323 U.S. at 532-38.

²³⁹ *White v. Davis*, 533 P.2d 222, 224 (Cal. 1975); *Anderson v. Sills*, 256 A.2d 298, 303 (N.J. Super. Ct. Ch. Div. 1969) (rejecting the balancing approach used in lesser scrutiny cases, resulting in greater scrutiny), *rev'd*, 265 A.2d 678 (N.J. 1970).

²⁴⁰ *Davis*, 533 P.2d at 224 ("Is this intelligence gathering by the police ... constitutionally valid when such [police] reports pertain to no illegal activity or acts?"); *Anderson*, 256 A.2d at 303 ("Nor should it be the task of the judiciary to balance governmental need against first amendment rights when the regulation, law, or official act goes beyond areas reasonably necessary to reach the permissible government goal").

²⁴¹ 419 U.S. 1314 (1974) (Marshall, Cir. J.).

surveillance at the Young Socialist Alliance's (YSA) annual convention. The YSA formally had renounced the use of violence, but the FBI still was concerned about a minority faction, the "Internationalist Tendency," which espoused violence and was seeking to take control of the YSA. The YSA convention was open to the public, and the FBI planned to use confidential informants at the convention to record the identities of participants and to take notes on the substance of participants' remarks. No photographic or electronic surveillance activities were planned, nor were searches of any kind conducted. In addition, any information collected by the FBI was to be made available only within the government. Nevertheless, the plaintiffs in *Socialist Workers Party I* alleged that the mere presence of the FBI informers chilled their associational and speech rights. The district court²⁴² granted the requested injunction, citing *Local 309 v. Gates* and pointing out that the FBI was unable to produce any evidence connecting the YSA to violence or illegal activity during the past thirty-four years. The Second Circuit stayed the injunction with one exception. Acknowledging that the plaintiffs probably would not be able to prevail on the merits because they apparently lacked standing and that the FBI had a legitimate interest in the faction known as Internationalist Tendency,²⁴³ the court allowed the FBI to transfer the information it already had obtained to the agency responsible for federal employment.²⁴⁴ The Second Circuit concluded that the evidence supporting the allegations of a chilling effect did not outweigh the harm to the government—specifically, the harm created by compelling the FBI to reveal the identities of its confidential informants.

Justice Marshall affirmed the judgment of the court of appeals. Although he recognized the plaintiffs' allegations as sufficient for standing, he accepted the balancing analysis employed by the Second Circuit.²⁴⁵ Four factors weighed in the government's favor: the public nature of the event; the limited nature of the surveillance activity itself; the lack of activity intended to disrupt the convention; and the assurances that none of the collected information would be distributed to nongovernmental entities. Marshall's holding implicitly rejected the application of a strict scrutiny standard to claims of injury caused by a chilling

²⁴²*Socialist Workers Party v. Attorney General*, 387 F. Supp. 747 (S.D.N.Y.), order vacated in part, 510 F.2d 253 (2d Cir.), stay of order denied, 419 U.S. 1314 (1974) (Marshall, Cir. J.).

²⁴³*Socialist Workers Party*, 510 F.2d at 253.

²⁴⁴The federal agency that then was responsible for government employment was the Civil Service Commission.

²⁴⁵"[T]he Court of Appeals has analyzed the competing interests at some length, and its analysis seems to me to compel denial of relief." *Socialist Workers Party*, 419 U.S. at 1319.

effect,²⁴⁶ at least when the extent or nature of the chilling effect is uncertain.²⁴⁷

In *Meese v. Keene*,²⁴⁸ the full Court was given an opportunity to classify a chilling-effect case under the strict scrutiny standard, but declined to do so. Keene challenged a federal statute that allowed for the labeling of certain films as “political propaganda,” including some films that he wished to show.²⁴⁹ Keene said that he could not show the films because of damage to his reputation and career. The district court²⁵⁰ labeled the effect of the statute as “censorship”—arguably a correct term to describe an act that deters or “chills” someone from delivering a message. The censorship label, however, placed the case in the prior restraint category. Prior restraints are subject to close scrutiny, and bear “a heavy presumption against (their) constitutional validity.”²⁵¹ Based on this standard, the district court found the statute unconstitutional, and the Attorney General appealed the case directly to the United States Supreme Court. The Supreme Court, however, refused to place the chilling-effect claim considered in *Meese v. Keene* into the prior restraint or censorship category.²⁵²

Other cases that have addressed the “chilling effect” issue have looked at the underlying reasons for the government’s information-gathering activities. Significantly, the factual basis for beginning an investigation has been a key consideration in pure surveillance cases. If an investigator has insufficient basis upon which to suspect that an investigation is warranted, a full and ongoing investigation will be deemed unreasonable. In *Clark v. Library of Congress*,²⁵³ for instance, a bookshelver at the Library of Congress was subjected to a full **FBI** investigation based on his occasional attendance at meetings of the YSA. Agents interviewed

²⁴⁶ “[O]ur abhorrence for abuses of governmental investigative authority cannot be permitted to lead to an indiscriminate willingness to enjoin undercover investigation of any nature, whenever a countervailing first amendment claim is raised.” *Id.*

²⁴⁷ The FBI had been watching the SWP and the YSA for years. Justice Marshall questioned, with regard to a short-term injunction effective until trial on the merits, whether granting the injunction would significantly lessen any ongoing “chill” injury. *Id.*

²⁴⁸ 481 U.S. 465 (1987).

²⁴⁹ See *supra* notes 190-191 and accompanying text.

²⁵⁰ *Keene v. Meese*, 619 F. Supp. 1111, 1117 (E.D. Cal. 1985), *reu’d on other grounds*, 481 U.S. 465 (1987).

²⁵¹ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (“Pentagon Papers” case).

²⁵² The Supreme Court’s opinion in *Keene v. Meese* actually did not address the district court’s use of the “censorship” argument. This failure may be explained by the Court’s conclusion that the plaintiffs alleged injuries were, in large part, avoidable. See *supra* note 191.

²⁵³ 750 F.2d 89 (D.C. Cir. 1984).

Clark's friends, family, and coworkers. The investigators also asked these individuals personal questions about Clark. As a result, Clark's family pressured him to give up his political activities, and Clark perceived that he failed to receive favorable consideration for several intralibrary positions, for which he applied after the investigation. The District of Columbia Circuit Court of Appeals held that when no apparent factual basis for an investigation existed, other than the subject's legitimate political beliefs, the investigation was unlawful.

In a more recent decision, *Alliance to End Repression v. City of Chicago*,²⁵⁴ a district court enjoined the FBI from continuing an investigation into a political organization. The court concluded that the investigation was unreasonable because the original source of information was an informer whose credibility never had been verified.²⁵⁵

Analyzed together, these cases support several important conclusions. First, courts will decide pure surveillance cases by ruling on the validity of the purpose and scope of the government's investigation. No court ever has held that a government's investigation imposed so much of a chilling effect on an individual that the government could not, as a matter of law, rebut the subject's claim by proving that it conducted its investigation in a proper and reasonable fashion. In particular, when the government has demonstrated a proper purpose and the plaintiff has not made a strong showing of an actual chilling-effect injury, the Supreme Court has refused to apply the strict scrutiny standard. Accordingly, if the government can show that its surveillance activities had a proper purpose and scope, and that it considered investigative techniques that would reduce or avoid a chilling effect, the government will prevail.

Unfortunately, the current physical security regulations present ample opportunity for attack based on the reasonableness of authorized investigative techniques. Other than its vague language on "lawful advocacy," *DOD Directive* 5200.27 provides no guidance on the type or quality of factual information necessary to support a physical security intelligence investigation. Likewise, *AR 380-13* is silent, except for a tenuous passage that requires the official ordering the investigation to "[r]easonably believe [that the targeted activity is] ... *Likely* to [interfere with military activities]." ²⁵⁶

²⁵⁴Nos. 74C3268, 75C3995, 1991 WL 206056 (N.D. Ill. 1991). This case was the latest decision in a series of related cases growing out of police, FBI, and military surveillance activities in the Chicago area. The district court did not find an issue actually involving constitutional interpretation but, rather, one requiring an interpretation of a consent decree that the FBI allegedly had violated.

²⁵⁵*Id.* at *9.

²⁵⁶*AR 380-13*, *supra* note 9, para. 6a (emphasis added).

The military regulations affecting physical security also reflect a considerable disparity concerning the types of investigation techniques that may be employed. Some of the techniques available under the more relaxed guidance have been attacked by courts that have considered pure surveillance cases. Naturally, the regulatory provisions that authorize such techniques need to be reconsidered carefully. In addition, the guidance should be as uniform as possible, so that a legal attack on the lack of a restriction in one regulation cannot be supported by reference to another regulation that contains the restriction. Consequently, the inconsistencies among the military regulations that address physical security investigations—as well as the inconsistencies between all of these regulations and the cases that have considered the chilling effect that these investigations may have on activities protected by the First Amendment and the Privacy Act—call for substantial changes in the regulatory framework.

VII. Analysis of Proposed Regulatory Changes

Both the current *DOD Directive 5200.27* and *AR 380-13* require significant changes.²⁵⁷ A new *AR 380-13* also should be created to reflect the changes in policy and detailed guidance contained in the draft *DOD Directive 5200.27*.²⁵⁸ The following discussion is keyed to the paragraphs of the proposed draft of *DOD Directive 5200.27*.

A. Reissuance and Purpose

This provision deletes reference to the “Defense Investigative Program.” This program was established pursuant to *DOD Directive 5200.26, Defense Investigative Program*,²⁵⁹ which was cancelled, and never reissued.

²⁵⁷ Other regulations also can use modification, including *DOD Directive 5240.1, DOD Directive 5240.1-R, AR 381-10, AR 190-30, and AR 190-45*. These regulations, however, are more limited in their applicabilities to physical security intelligence operations than *DOD Directive 5200.27* or *AR 380-13*.

²⁵⁸ Because *AR 380-13, supra* note 9, has not been reissued since 1974, the regulation needs extensive rewriting. When this article was prepared, the proponents of *AR 380-13* were awaiting the reissuance of *DOD Directive 5200.27* before drafting a new *AR 380-13*. In addition to its dependence on *DOD Directive 5200.27*, a new *AR 380-13* will have to be consistent with *AR 381-10*. See *AR 381-10, supra* note 38, para. 5a (indicating that *AR 380-13* is the “sole and exclusive authority” for collection of information on nonaffiliated persons). The provisions of *AR 381-10* and *AR 381-20* are new and separate authorities for collecting counterintelligence information on domestic terrorist threats.

²⁵⁹ DEPT OF DEFENSE, *DIRECTIVE 5200.26, DEFENSE INVESTIGATIVE PROGRAM* (Feb. 17, 1971) (cancelled June 12, 1979).

B. Applicability and Scope

Paragraph B.2.c is new. This paragraph recognizes that the DOD should not employ unfettered collection operations solely because a person or organization has some affiliation with the DOD unless a connection exists between the information sought and the affiliation. For example, proposed surveillance of a contractor who participates in a political rally should be subject to the restrictions of *DOD Directive 5200.27* if the rally bears no reasonable connection to the contractor's work performance.

C. Definitions

The existing directive had no definitions paragraph, but key terms clearly need to be defined. These definitions are discussed as the terms are developed below.

D. Policy

No change.

E. Situations Warranting Collection

Subparagraph E.1, previously entitled "Protection of DOD functions and property," has been rewritten entirely. The investigation and prosecution of crimes—that is, the classic "law enforcement" function—is conceptually different from security. Therefore it has been removed from subparagraph E.1 and replaced in subparagraph E.4. Furthermore, the redrafted version of subparagraph E.1 incorporates the Supreme Court's mandate from *CCNV* that the regulation "further a substantial interest . . . unrelated to free speech."²⁶⁰

To facilitate the incorporation of this provision, a definition of the term "substantial government interest" has been provided. The overriding mission of the military is to protect the nation against foreign aggression. The ability to defend against and deter foreign aggression can be defined as protection of "national security." Intelligence operations with a discernible connection to national security, therefore, will satisfy the "substantial government interest" requirement. Accordingly, the definition of "national security" also appears in paragraph B.

Certain threats, such as theft or destruction of property and violence to personnel, are listed specifically in paragraph E.1 because the impact of these activities on morale and readiness almost always will have some connection to national security.

²⁶⁰Clark v. Community for Creative Nonviolence (*CCNV*), 468 U.S. 268, 294 (1984).

Moreover, the fruits of investigations arising from threats involving the use of force or violence will apprise local authorities, or even the FBI,²⁶¹ of law enforcement concerns that likely will motivate them to employ their assets to neutralize these threats.

The commander's authority on the installation, and authority to protect the installation, also justify physical security intelligence operations when he or she suspects that individuals may attempt to launch a physical invasion of the installation.²⁶²

Paragraph E.1 concludes with a broad provision that places the surveillance of many types of activities within the penumbra of "national security." A demonstration that affects the movement of nuclear and chemical weapons, for example, almost certainly falls within the category of activities that affects "national security," while a demonstration that simply slows everyday commuter traffic normally would fail to meet this standard. Even a peaceful demonstration that blocks or delays military traffic may fail the "national security" standard when its only effect is to delay a unit until the local authorities are called in to break up the disruption. The key issue in each case will be whether the delay, in and of itself, has "national security" implications.

The proposed government action must be "within the constitutional power of the government."²⁶³ The importance of limiting action to "substantial government interests" is highlighted by this part of the CCNV mandate. The authority of the military to interfere in civil affairs,²⁶⁴ arguably dissipates in proportion to the distance from the installation of the attempted exercise. The military always can assert that a threat to national security or a military necessity triggers its prerogative to defend itself—even if, in defending itself, the military's actions affect an individual's First Amendment rights. To be credible, however, the military must advance these assertions sparingly, limiting its actions to situations in which the apprehension of a threat is the product of informed judgment, rather than mere speculation.

The proposed government action also must be "unrelated to the suppression of free speech."²⁶⁵ Paragraph E.1 has been

²⁶¹Sit-ins or other peaceful civil disobedience tactics are not federal crimes. On the other hand, conspiracy to disrupt government activities through force or violence is a felony within the jurisdiction of the FBI. See 18 U.S.C. § 2384 (1988) (seditious conspiracy).

²⁶²See *supra* note 132.

²⁶³CCNV, 468 U.S. at 294.

²⁶⁴See *United States v. Banks*, 539 F.2d 14 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); *supra* notes 130-132 and accompanying text.

²⁶⁵CCNV, 468 U.S. at 294.

drafted so that only the actual threat of a physical act—such as theft, destruction, force, violence, unauthorized entry, and physical disruption—properly could justify an investigation.²⁶⁶ Whether the threat results from a demonstration or other arguably political event is irrelevant; therefore, specific references to demonstrations have been deleted. If dealing with the threat requires the command to have information about subversion or attempted subversion, the situation should be treated as a criminal matter or a personnel security matter—not as a physical security problem.²⁶⁷

F. Collection Procedures

The *CCNV* mandate that the regulation be “narrowly drawn”²⁶⁸ is implemented in this provision. If the local authorities, law enforcement or otherwise, will provide the needed information, no need for an independent military investigation arises.

Approval authority should flow from the civilian leadership,²⁶⁹ yet the existing regulations provide for emergency action by the commander without significant limits on the commander’s discretion.²⁷⁰ The proposed draft *DOD Directive 5200.27* provides that, even in an emergency situation, someone other than the local commander must consider the situation in detail and ultimately must approve of the operation. In addition, the same approval standards should be used for judging a proposed intelligence operation, whether or not it is labeled “emergency.” Likewise, if an investigation is proposed based on an unverified or

²⁶⁶At the 1974 hearings on military surveillance, the DOD representative was asked about the targets of any special operations that had been approved in accordance with the provisions of the original *DOD Directive 5200.27*. “Let me say they were a group who would advocate, for example, putting sand in the fuel tanks of our planes, or another example, advocating throwing a monkey wrench into the reduction gears of a ship or not obeying orders of a commanding officer of a naval vessel.” *Hearings on Military Surveillance, supra* note 10, at 118 (statement of Mr. Cooke).

²⁶⁷Personnel security investigations should be pursued from the standpoint of the potential target—that is, by identifying military personnel who are vulnerable to manipulation, rather than by tracking nonaffiliated persons who might attempt to subvert military personnel. Separate guidance exists for these loyalty investigations. See Exec. Order No. 10,450, 18 Fed. Reg. 2489 (1953) (Security Requirements for Government Employment).

²⁶⁸*CCNV*, 468 U.S. at 294.

²⁶⁹“The failure of senior civilian officials to know of the [Army surveillance] program, or if knowing, to halt it, represents one of the most serious breakdowns of civilian control of the military in recent years.” *Report on Military Surveillance, supra* note 7, at 5.

²⁷⁰See AR 380-13, *supra* note 9, para. 9e.

incredible source, the focus of the initial investigation will be on verifying the credibility of the source.²⁷¹

If an activity can be restructured to avoid the potential reach of any perceived threat, no additional investigation is warranted. If the subject activity is not expected to pose any threat of actual entry onto the installation, the commander can direct his or her ongoing military missions to avoid the adjacent on-post areas entirely. For example, a peaceful demonstration that will not impact every available gate would not require an investigation because the commander can order the use of alternative gates.

The factual basis for collection is set forth in paragraph F.1.b of the proposed directive. The reasonable suspicion standard is taken from *Terry v. Ohio*.²⁷² The reasonable suspicion standard in *Terry* provides a fairly objective standard that is developed, and will continue to develop, in the case law.

All references to “advocacy” and “lawful advocacy” are eliminated from the directive as unnecessary and confusing. In *Brandenberg v. Ohio*,²⁷³ the Supreme Court set standards for the direct criminalization of speech—a legislative act that directly implicates the first amendment. One commentator, citing *Brandenberg*, has argued that evidence of advocacy of illegal conduct, when such advocacy falls short of the *Brandenberg* criminalization threshold, cannot provide a constitutional basis of support for initiating an investigation of a political organization.²⁷⁴ Nevertheless, a proper investigation that is focused on the real threat of some future physical act—even though it may be initiated based on speech—is not a criminalization of speech such as that challenged in *Brandenberg*.

More importantly, the philosophic underpinning of *Brandenberg* limits its use as an analytic analogy in considering the constitutionality of investigative activities. By holding that

²⁷¹ See *Alliance to End Repression v. City of Chicago*, Nos. 74C3268, 75C3995, 1991 WL 206056 (N.D. Ill. 1991). The FBI conducts a limited investigation called a “preliminary inquiry” when acting on information that is ambiguous, incomplete, or from a source of unknown reliability. When the preliminary inquiry fails to disclose sufficient information to warrant a full investigation, the matter is closed. United States Dep’t of Justice, Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, para. II.B. (Mar. 7, 1983), reprinted in 32 CRIM. L. REP. (BNA) 3087 (Mar. 23, 1983).

²⁷² 392 U.S. 1 (1968) (requirements of the Fourth Amendment were satisfied when policeman conducted a short stop and a limited search pursuant to a reasonable suspicion based on articulable facts).

²⁷³ 395 U.S. 444 (1969).

²⁷⁴ Mitchell S. Rubin, Note, *The FBI and Dissidents: A First Amendment Analysis of Attorney General Smith’s Guidelines on Domestic Security*, 27 ARIZ. L. REV. 453 (1985).

advocacy of illegal conduct cannot be criminalized unless combined with direct incitement to imminent illegal conduct and a reasonable likelihood that such illegal conduct would come about, the *Brandenberg* Court was attempting to create breathing space between speech that clearly is protected by the First Amendment and speech that can be criminalized. Speech in this breathing space, which might include advocacy of criminal conduct without an immediate prospect of harm, is not itself constitutionally favored; rather, it cannot be criminalized for fear that truly protected speech—such as a discussion of communist and marxist ideology—will be chilled if the speaker has to agonize over the definition of “advocacy.”²⁷⁵ Accordingly, to the extent a physical security intelligence investigation is initiated in or around speech in the *Brandenberg* breathing space, the chilling effect does not impact constitutionally favored speech directly. Furthermore, because the chilling effect of a mere investigation is less than that of an actual criminal prosecution, any indirect impact on constitutionally favored speech—such as a purely political discussion of American military policy—is attenuated.

Definitions of lawful advocacy and proper breathing space are too abstract for meaningful guidance. The proposed directive combines the reasonable suspicion requirement with an imminent harm requirement that focuses the investigation on real time threats. Even if an investigation is based solely on lawful “advocacy,” the reasonable suspicion and imminent harm requirements should satisfy any constitutional challenge based on *Brandenberg*.

Paragraphs E.1.f. and E.1.g. of the draft directive restrict the range of available investigative techniques. The restrictions are based on a balancing test. Specifically, if a given technique is not absolutely necessary for real-time physical security requirements, the amount of chilling effect that the technique might cause is weighed against the investigative value of the technique. The restrictions chosen also make *DOD Directive 5200.27* comport more closely in substance to the restrictions in the intelligence component regulations—that is, *DOD Directive 5240.1-R* and *AR 381-10*.

In addition, the draft directive favors covert surveillance in lieu of overt surveillance. Covert surveillance is preferred from the standpoint of reducing any injury caused by a chilling

²⁷⁵Schauer, *supra* note 169, at 722-25. Although *Brandenberg* was convicted for advocacy of violent activity, the facts as restated by the *Brandenberg* Court left some question as to whether the plaintiff was **just** discussing the possibility of criminal activity or actually was advocating such activity. See *Brandenberg*, 395 U.S. at 446-47.

effect.²⁷⁶ The draft directive favors the use of publicly available sources of information. This generally complies with courts' decisions, which have approved of investigations limited to public meetings and public sources.²⁷⁷

The draft directive also places limits on the use of informers who are officers of the targeted organization. The cases have not disapproved of the use of informers or infiltrators *per se*,²⁷⁸ but if the informer is an officer of the group investigated, the courts may imply some internal interference beyond the scope of a reasonable investigation.²⁷⁹

The draft directive prohibits the use of any device that records video or audio data in permanent form.²⁸⁰ Consider a hypothetical rally involving a group protesting military personnel policies outside a military installation. A man in uniform is observing the proceedings. The man may not be particularly threatening; perhaps he is a policeman there simply to keep order should a disturbance break out. The policeman suddenly picks up a camera or a videotape recorder and starts taking pictures of people at the demonstration. The chilling effect would increase markedly as attendees wondered who the man was and why he was taking photographs. Interest in the activities of the group understandably may diminish for those who were afraid of being associated with the group or its message.

Likewise, contrast the potential effects of *taking* photographs with the evidentiary or investigatory value of *having* photographs on file. While a permanent record may be useful in a future law enforcement proceeding, such photographs have only a marginal value to an investigation intended to discover and counter a real-time security threat. Audio recording devices are of a similarly limited value, although they are slightly less invasive because they only record the speaker—not the listener—and because the speaker often is not readily identifiable from the tape.

²⁷⁶ See *supra* notes 195-204 and accompanying text.

²⁷⁷ See, e.g., *Donohoe v. Dowling*, 465 F.2d 196 (4th Cir. 1972); *Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1319 (1974) (Marshall, Cir. J.).

²⁷⁸ See, e.g., *Socialist Workers Party*, 419 U.S. at 1318; *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 769 (S.D.N.Y. 1972).

²⁷⁹ *Alliance to End Repression v. Chicago*, 627 F. Supp. 1044, 1047 (N.D. Ill. 1985).

²⁸⁰ Cf. *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974). In *Fifth Avenue Peace Parade Committee*, the FBI studied bank and transportation records and watched bus routes in an effort to predict the numbers of demonstrators attending a mass rally in Washington, D.C. In refusing to recognize any cognizable injury to plaintiff, the court of appeals relied on FBI representations that it had recorded no personal information and taken no photographs.

The draft directive also bans direct participation in a search, seizure, or arrest. This provision emphasizes the minimum requirements of the Posse Comitatus Act.²⁸¹

Finally, the draft directive implicitly acknowledges that, although overt physical surveillance is particularly intimidating, covert physical surveillance operations, by definition, are not. Accordingly, the proposed directive contains no restrictions on covert surveillance.

H. Retention of Information

This paragraph establishes a very restrictive approach to the retention of information. Some commentators have argued that the Privacy Act ban on the collection of information describing the exercise of First Amendment rights applies to physical security intelligence operations.²⁸² Several cases have raised fears that personal information gathered during the course of political surveillance might become public or might be used for other purposes within the government.²⁸³ Blanket routine uses of the USAINSCOM intelligence files and local criminal information files—that is, the files most likely to contain physical security intelligence information—actually include release within the government for purposes such as hiring, firing, contracting, and obtaining a security clearance.²⁸⁴ Accordingly, these fears are not entirely without merit.

To reduce these apprehensions, the draft directive requires that, whenever possible, personal information be summarized in nonpersonal form. In addition to severing the information's link to individuals, summarization renders the Privacy Act inapplicable.²⁸⁵ The draft directive also forbids the collection or retention of certain information, including personal financial, educational, sexual, and religious information. This information is largely irrelevant to real-time physical security requirements, and the absence of such information diminishes the likelihood of creating "adverse effects"²⁸⁶ and avoids claims that the directive is not "narrowly drawn."²⁸⁷ Finally, all information that is collected must be reviewed every ninety days, and personal information

²⁸¹ 18 U.S.C. § 1385 (1988); see *supra* notes 163-166 and accompanying text

²⁸² See *supra* notes 108-110, 131-135, and accompanying text

²⁸³ See *supra* notes 208-209

²⁸⁴ See AR 340-21, *supra* note 54, para 3-2c; DA PAM 25-51, *supra* note 98, paras 6-7, 6-25

²⁸⁵ See *supra* notes 94-95 and accompanying text

²⁸⁶ See *supra* notes 147-149 and accompanying text (discussing Privacy Act enforcement)

²⁸⁷ See *supra* note 232 and accompanying text (substantive First Amendment analysis)

may be retained only if the subject is still an imminent threat to national security.

Another alternative, which is not employed in this draft directive, would be to create a new “physical security intelligence” systems of records. Such a category of records would have no use or dissemination except to other law enforcement agencies and, even then, such use or dissemination would be permissible only when necessary to avert immediate harm or to facilitate ongoing physical security operations.

Finally, the directive should be publicized widely. Broad availability of the proposed directive will put the potential plaintiff on notice of when the military might initiate surveillance. Armed with this notice, the plaintiff can structure his or her protest or activities so as to avoid any military investigation or any attendant chilling effect. As the Supreme Court implied in *CCNV*,²⁸⁸ the existence of *any* alternative way to communicate a message—even if it is not the plaintiff’s preferred way of communication—will defeat an attack on an otherwise proper exercise of government power.

VIII. Conclusion

Antiwar and antimilitary demonstrations have occurred during every modern conflict. When a commander anticipates such a demonstration outside an installation, he or she naturally wants to know as much as possible about the demonstrators and any potential threat they may pose to installation facilities, personnel, or operations. Unfortunately, the Army’s internal procedures for obtaining this information are confusing and contradictory. Consequently, commanders inadvertently may collect and retain information illegally, thereby subjecting the Army to litigation and bad publicity.

By linking physical security intelligence investigations to specific national security interests, by connecting specific threats to the interest affected, by setting threshold information requirements for triggering investigations, and by using carefully drawn standards of retention and use, the regulations can become “narrowly drawn to further substantial government interests ... that are unrelated to the suppression of speech.”

This approach ensures that both the requirements of the Privacy Act and the First Amendment are satisfied, without sacrificing the flexibility the commander needs to carry out essential missions.

²⁸⁸ 468 U.S. 268, 294 (1984).

APPENDIX

Department of Defense Directive **5200.27** DRAFT

SUBJECT: Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense

References: (a) DoD Directive **5200.27**, subject as above, January 7, **1980** (hereby canceled).

(b) DoD Directive **5240.1**, "Activities of DoD Intelligence Components that Affect U.S. Persons," April 25, **1988**.

(c) DoD 5240.1-R, "Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons," December, **1982**.

(d) Memorandum of Understanding Between the Departments of Justice and Defense Relating To the Investigation and Prosecution of Certain Crimes, August, **1984**.

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) to establish general policy, limitations, procedures, and operational guidance pertaining to the collecting, processing, storing, and dissemination of information concerning persons and organizations not affiliated with the Department of Defense.

B. APPLICABILITY AND SCOPE

1. This Directive is applicable to all DoD Components, except for DoD Intelligence Components.

2. This Directive is applicable only to the acquisition of information concerning the activities of:

a. any U.S. citizen who is not affiliated with the Department of Defense; or

b. any person or organization, not affiliated with the Department of Defense, located in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, or U.S. territories or possessions.

c. any person or organization affiliated with DoD, if there is no connection between the purpose for which the information is being collected and the affiliation.

C. DEFINITIONS

1. *DoD Component.* The Office of the Secretary of Defense, Military Departments, Office of the Joint Chiefs of Staff, Unified and Specified Commands, and the Defense Agencies.

2. *DoD Intelligence Component.* Those DoD components which satisfy the criteria of DoD Directive **5240.1** (reference (b)), paragraph C.4.

3. *Persons and Organizations Affiliated with the Department of Defense.* Persons or organizations that are employed by or under contract with the DoD; active, reserve, or retired members of the Armed Forces; residing on or having requested access to any DoD installation; having authorized access to defense information; participating in any other authorized program; or who are seeking a status listed in this subparagraph.

4. *Reasonable Suspicion.* A suspicion based on specific, articulable facts; more than a mere hunch.

5. *Imminent.* Within a definitive period of time, not to exceed thirty days.

6. *Essential to National Security.* Connected directly, in some articulable way, to the nation's ability to deter and defeat foreign aggression.

7. *Personal Information.* **Any** information which identifies a person by name or other personal identifier.

8. *Physical Surveillance.* See procedure 9, reference (c).

D. POLICY

1. Department of Defense policy prohibits collecting, reporting, processing, or storing information on individuals or organizations not affiliated with the Department of Defense, except in those limited circumstances, as defined in this Directive, where such information is essential to the accomplishment of the Department of Defense mission.

2. Information-gathering activities shall be subject to overall civilian control, including frequent inspections at the field level and a high level of general supervision.

3. Where collection activities are authorized, maximum reliance shall be placed upon domestic civilian investigative agencies, Federal, State, and local.

4. (Not Reproduced—only concerns overseas operations)

E. SITUATIONS WARRANTING COLLECTION

DoD Components are authorized to gather information for the following purposes.

1. *Physical Security of Personnel) Functions, and Property.* Information may be acquired about nonaffiliated personnel that threaten military personnel, property, and functions, but only to protect against the circumstances listed in this paragraph and only in accordance with the collection techniques of paragraph F.

- a. Theft, destruction, or damage of military property.
- b. The use of force or violence against military personnel.
- c. Unauthorized personnel entering a military installation.
- d. Physical acts disrupting military activities essential to the national security.

2. *Personnel Security* (Not Reproduced)

3. *Operations Related to Civil Disturbance.* (Not Reproduced)

4. *Crimes for which DoD has Responsibility for Investigating or Prosecuting.* Responsibility is set forth in reference (d).

F. COLLECTION PROCEDURES

1. *Physical Security.*

a. Commanders are encouraged to solicit general information, on a continuing basis, from local civilian investigative agencies concerning the situations described in paragraph E.1 above.

b. When the commander has a reasonable suspicion that one or more of the situations described in paragraph **E.1** is imminent, he will attempt to obtain any additional needed information from local authorities. If this information is insufficient, and the commander believes that off-post investigation is needed, he will develop an investigative scheme and supporting plan.

c. The plan will set forth the proposed investigation, indicating in particular:

1. The activity that is threatened.
2. The subsection of paragraph E that is implicated.

3. Why there is no way to restructure the planned activity to avoid the threat without conducting an off-post investigation.

4. The scope of proposed investigation, including an assertion that the requirements of paragraph e, f, and g below will be complied with.

d. The plan must be approved by the Secretary of the Military Department. Approval authority may be delegated to an Undersecretary or Assistant Secretary. In an emergency, if the appropriate civilian authority cannot be contacted in timely manner, anyone in the local commander's chain of command may approve the operation. The commander will still comply with paragraph F.1.c, including telephonic notification to the approval authority of the elements of information required by F.1.c.

e. If the credibility of the information source supporting the investigation has not been verified, the investigation will verify the reliability of the source before proceeding further.

f. Where possible, investigators will proceed without identifying themselves or their affiliation with the military, and will gather information from public sources. Information collected will relate only to the imminent threat designated in paragraph E above.

g. The following is prohibited:

1. The placement or use of informers or infiltrators who are officers in a targeted organization, unless there is a reasonable suspicion that the organization plans the imminent use of force or violence against military personnel or property.

2. The collection of any personal information unless there is reason to believe the individual is actively and personally involved in planning or executing an activity posing a threat as defined in paragraph E.1. Mere membership or other association with an organization suspected of planning or executing such an activity is insufficient, by itself, to support collection of personal information.

3. The use of any technique intended to intimidate, harass, or otherwise influence the activities of any person or organization.

4. The use of electronic surveillance.

5. The use of cameras, videotape recorders, audiorecorders, or any other device that will make a permanent audio or video record.

6. The direct participation in a search, seizure, or arrest.

7. Overt physical surveillance.

2. *Personnel Security.* (TBD)

3. *Operations Related to Civil Disturbances.* (TBD)

4. *Crimes for Which DoD Has Responsibility for Investigating or Prosecuting.* (TBD)

H. RETENTION OF INFORMATION

1. *Personal Information collected in accordance with paragraph E.1.*

a. Unless a clear need for retention can be identified, personal information will be edited or summarized immediately after collection to remove the names of individuals and other personal identifiers.

b. No information about personal financial status, educational history, sexual practices, or religious beliefs will be collected or retained under any circumstances.

c. All personal information will be deleted within 90 days of collection, unless a continuing reasonable suspicion exists that the individual poses an imminent threat under circumstances defined in paragraph E.1..

2. Information collected in accordance with paragraphs E.2. through E.4 shall be destroyed within 90 days of collection unless its retention is required by law or unless its retention is specifically authorized under separate criteria of the Secretary of Defense.

I. GENERAL GUIDANCE

1. Nothing in this directive shall be construed to prohibit the prompt reporting to law enforcement agencies of any information indicating the existence of a threat to life or property, or the violation of law, nor to prohibit keeping a record of such report.

2. Nothing in this Directive ... (continue as in paragraph F2, original DoD 5200.27)

J. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately.

TIME TO EXORCISE ANOTHER GHOST FROM THE VIETNAM WAR: RESTRUCTURING THE IN-SERVICE CONSCIENTIOUS OBJECTOR PROGRAM

WILLIAM D. PALMER*

Consistent with the national policy to recognize the claims of bonafide conscientious objectors in the military service, an application for classification as a conscientious objector may be approved for any individual:

- (1) Who is conscientiously opposed to participation in war in any form;
- (2) Whose opposition is founded on religious training and beliefs; and
- (3) Whose position is sincere and deeply held.¹

I. Introduction

The Department of Defense, through a directive published August 20, 1971, authorized military personnel who develop conscientious objections to military service to apply for discharge or noncombatant duty.² Nevertheless, this directive regulating in-service conscientious objectors, like any vehicle built in the 1960s and last serviced in 1971, is in need of a serious overhaul. It contains standards and procedures that were designed to accommodate a military shaped by the draft, not a volunteer force. It incorporates judicially created definitions and standards that, instead of interpreting legislative intent, ignored legislative intent. It stands as an unchanged monument to the military and

*Judge Advocate General's Corps, United States Army. Presently assigned as Command Judge Advocate, United States Disciplinary Barracks, Fort Leavenworth, KS. B.A., 1980, St. John's University, MN; J.D., 1983, University of Minnesota; LL.M., 1993, The Judge Advocate General's School, United States Army. Former assignments include Instructor and Associate Professor, Department of Law, United States Military Academy, 1989-1992; Post Judge Advocate, Sierra Army Depot, CA, 1986-1989; Assistant Staff Judge Advocate, 5th Infantry Division and Fort Polk, LA, 1984-1986. This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 41st Judge Advocate Officer Graduate Course.

¹32 C.F.R. § 75.5(a) (1992); DEP'T OF DEFENSE, DIRECTIVE 1300.6, CONSCIENTIOUS OBJECTORS, para. V.A. (Aug. 20, 1971).

²DEP'T OF DEFENSE, DIRECTIVE 1300.6, CONSCIENTIOUS OBJECTORS, para. V.A. (Aug. 20, 1971).

the law relating to the military as those institutions existed in 1971; untouched by subsequent changes in the law; unaffected by the massive restructuring of United States armed forces themselves; and unconcerned by the ongoing, fundamental reshaping of United States defense policy.

The purpose of this article is to analyze critically the law of the in-service conscientious objector and suggest changes to the Department of Defense directive that established the in-service conscientious objector program. The article will review the history, development, and present application of the law governing the in-service conscientious objector. The article then will analyze the weaknesses of the current law and suggest ways to address those weaknesses, discussing the legal and policy justifications supporting these suggested changes.

Recent publicity concerning in-service conscientious objectors and proposed legislation addressing the issue demonstrate that the analysis in this article is not merely an academic exercise. The nation's mobilization and war effort in operations Desert Shield and Desert Storm focused the nation's attention on the military and on military issues that largely had lay dormant for most of the twenty years since the end of United States involvement in the war in Vietnam.

One of the military issues to generate attention was the controversy over the in-service conscientious objector. The nation's first large-scale deployment of forces since the Vietnam War generated a surge in applications for conscientious objector status by military personnel.³ Cases of soldiers who refused orders or

³The Office of the Assistant Secretary of Defense for Public Affairs compiled the following statistics as of January 2, 1992:

CO Applications (All Services)

FY 1989	147	(120 approved)
FY 1990	214	(152 approved, 48 disapproved, 14 returned or discharged before completion)
FY 1991	401	(221 approved, 141 disapproved, 39 withdrawn or pending final action)

Memorandum from Lieutenant Colonel Doug Hart, Office of the Assistant Secretary of Defense for Public Affairs to Major William D. Palmer, at 2-3 (Jan. 2, 1992) (on file with author). The number of applications received by the Army during the last five years breaks down as follows:

CO Applications (Army)

FY 1988	85	(56 approved, 8 disapproved, 21 returned, withdrawn or advisory)
FY 1989	90	(56 approved, 5 disapproved, 29 returned, withdrawn or advisory)
FY 1990	84	(64 approved, 12 disapproved, 8 returned)
FY 1991	271	(131 approved, 95 disapproved, 45 returned or withdrawn)

who refused to deploy overseas citing conscientious objections to service generated national press coverage.⁴ Service personnel denied conscientious objector discharges challenged these decisions in the federal courts.⁵

The visibility the conscientious objector issue gained during the Gulf War led to criticism of the current Department of Defense policy as being insufficiently protective of soldiers' interests. This new-found visibility also led to proposed legislation in the 102d Congress that would have codified and broadened the protections and rights of the in-service conscientious objector.⁶ This legislation would have expanded the bases for claiming conscientious objector status and significantly added to the military's administrative burdens in accommodating and adjudicating conscientious objector claims.

Nevertheless, the current public debate concerning the proper treatment of the in-service conscientious objector fails to address the most fundamental questions surrounding the issue. What is the role of an in-service conscientious objector program in an all-volunteer force? Is it appropriate that the nation relies on an in-service conscientious objector program that is a product of the Vietnam war era law of conscientious objector exemptions from the draft? What is the impact of an in-service conscientious objector policy on the ongoing restructuring of United States military forces and the country's national defense policy?

FY 1992 105 (80 approved, 14 disapproved, 11 returned or withdrawn)

Memorandum from Colonel Duane Lempke, Dep't of the Army, Office of the Deputy Chief of Staff for Personnel, Special Review Boards to Major William D. Palmer, at 2-4 (Feb. 9, 1993) (on file with the author).

⁴See Elizabeth Hudson, *Army Doctor Continues Hunger Strike: Citing Conscience, He Seeks Discharge*, WASH. POST, Dec. 13, 1990, at A44 (describing Army Captain Jeffrey Wiggins's efforts to make himself useless to the Army after the Army and a federal court refused to grant him a conscientious objector discharge); Peter Applebome, *Epilogue to Gulf War: 25 Marines Face Prison*, N.Y. TIMES, May 1, 1991, at A5 (reporting the pending court-martial cases involving Marines who refused to deploy with their units and who claimed they did so based on conscientious objections); Rorie Sherman, *War Is Not Over For "COs"*, THE NAT'L L. J., Aug. 5, 1991, at 1 (relating the circumstances and legal arguments of the Marines convicted at court-martial of military offenses based on their refusal to deploy because of claimed conscientious objections to service).

⁵See *Hager v. Secretary of the Air Force*, 938 F.2d. 1449 (1st Cir. 1991); *Czarnecki v. Secretary of the Navy*, Civ. No. 90-00619 (D. Haw. Aug. 22, 1990); *Wiggins v. Secretary of the Army*, 571 F. Supp. 1238 (W.D. Tex. 1990); *Pruner v. Department of the Army*, 755 F. Supp. 362 (D. Kan. 1991); *Ballard v. Secretary of the Army*, Civ. No. 90-12509-H (D. Mass. July 8, 1991); *Johnson v. Stone*, No. C-91-0427 EFL, 1991 U.S. Dist. LEXIS 4053 (N.D. Cal. 1991); *United States ex rel. Brandon v. O'Malley*, No. 91 C 1016, 1991 U.S. Dist. LEXIS 11492 (N.D. Ill. 1991); *Reiser v. Stone*, 791 F. Supp. 1072 (E.D. Pa. 1992); *Jones v. Mundy*, 792 F. Supp. 1009 (E.D. N.C. 1992); *Allison v. Stone*, No. C-92-1541 BAC 1992 U.S. Dist. LEXIS 12429 (N.D. Cal. 1992).

⁶Military Conscientious Objector Act of 1992, H.R. 5060, 102d Cong., 2d Sess. (1992).

The article will address these fundamental issues and conclude that while the in-service conscientious objector program serves an important function, like the 1960s model car designed and built for the needs of its time, the in-service conscientious objector program must be overhauled to meet the demands of the vastly different world it faces today.

II. History of the In-Service Conscientious Objector

The current policy toward in-service conscientious objectors is the latest expression of a national tradition to exempt from compulsory military service citizens who, because of their religious beliefs, conscientiously oppose military service. The history of the in-service conscientious objector, as contrasted with the conscientious objector to compelled or conscripted service, is relatively short. Nevertheless, even though the in-service conscientious objector program is recent, it shares the heritage of the larger and far older tradition of accommodating conscientious objectors to compulsory military service. Reviewing the history of this tradition serves two purposes. This history demonstrates the development of the nation's policy of accommodating conscientious objection to compelled military service. This history also demonstrates the limitations Congress consistently sought to impose on any exemption from compulsory military service based on conscientious objections.

The colonial period saw mixed responses by the individual colonies to the conscientious objector. Some colonies excused objectors from compulsory service in the militias, while other colonies forced conscientious objectors to choose between fidelity to their religious beliefs and heavy taxes, fines, or even prison.⁷ Early in the American Revolution the Continental Congress adopted a resolution recognizing and respecting conscientious objections to compulsory service in the state militias when such objections arose from religious beliefs. This resolution, however, also encouraged conscientious objectors to "*contribute liberally* in this time of national calamity" and to offer whatever services they were able to perform, consistent with their religious principles.⁸

⁷SELECTIVE SERVICE SYSTEM, SPECIAL MONOGRAPH NO. 11, VOL. I, CONSCIENTIOUS OBJECTION 29 (1950) [hereinafter MONOGRAPH]; STEPHEN M. KOHN, JAILED FOR PEACE 6 (1986).

⁸The full text of the July 18, 1775 resolution read as follows:

As there are some people who from Religious Principles cannot bear arms in any case, this Congress intends no Violence to their Consciences, but earnestly recommends it to them to *Contribute Liberally*, in this time of national calamity, to the relief of their distressed Brethren in the several Colonies, and to do all other services to their oppressed country, which they can consistently with their Religious Principles.

MONOGRAPH, *supra* note 7, at 33-34.

The Civil War period saw the first examples of national conscription and the first affirmation of the concept of exemption from national military service because of religious-based conscientious objections to such service. Individual states had enacted conscientious objection exemptions to compulsory service in the militias that, at least arguably, did not require a religious basis to qualify for the exemption.⁹ The national government, however, had not addressed the matter since the Revolutionary War, during which it had addressed only conscientious objections based on religious principles.

After several years of unsatisfactory experience with draft laws that made no provision for Quakers and others having conscientious objections to military service, Congress passed a new draft act in 1864 containing an exemption for conscientious objectors.¹⁰ This exemption was limited to only those members of religious denominations whose religious tenets forbade the bearing of arms and who had conducted themselves in a manner consistent with such beliefs.¹¹ Furthermore, the exemption applied to combatant military service only. Therefore, conscientious objectors were subject to the draft, but served in noncombatant roles only.¹²

The Confederate Congress also made provision in its conscription policies for the religious conscientious objector. Beginning in April 1862, the Confederate Congress assumed

⁹The Maryland constitutional convention of July 1776 passed a resolution directing the convention committees to consider distinguishing between conscientious objectors who fail to enroll in the militia because of religiously based conscientious objections and those whose objections were based on other motives. Before the Civil War, the states of Pennsylvania, Alabama, Texas, Illinois, Iowa, Kentucky, and Indiana adopted conscientious objector exemptions from compulsory militia service in their state constitutions. These exemptions did not specify that the conscientious objections must be religiously based. *Id.* at 37, 39-40.

¹⁰Act of Feb. 24, 1864, ch. XIII, § 17, 13 Stat. 9 (1864).

¹¹The exemption read as follows:

And be it further enacted, That members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered noncombatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers: *Provided*, That no person shall be entitled to the benefit of the provisions of this section unless his declaration of conscientious scruples against bearing arms shall be supported by satisfactory evidence that his department has been uniformly consistent with such declaration.

Id.

¹²*Id.*

authority over the military draft and, later that same year, provided an exemption that lasted for the duration of the war for members of named pacifist denominations, provided that such persons furnished substitutes or paid taxes.¹³ Accordingly, both sides in the Civil War granted exemptions from compulsory service for conscientious objectors whose religions forbade them from participating in combat.

In 1917, Congress again authorized a draft to support the United States' effort in World War I and, as it did with the Civil War draft laws, authorized a noncombatant exemption for conscientious objectors belonging to pacifist denominations.¹⁴ Of the 2,810,296 men inducted under this draft law, local boards certified 56,830 claims for noncombatant service under the conscientious objector exemption.¹⁵ Ultimately, Congress authorized the military to furlough enlisted men from military control and the Secretary of War used this authority to furlough conscientious objectors who were against any kind of military service so they could work in agriculture and industry.¹⁶

Although the draft law limited the noncombatant exemption to members of pacifist sects, the Adjutant General of the Army broadened the exemption's coverage to include those who possessed "personal scruples against war."¹⁷ This was the first—and, until the Supreme Court interpreted the exemption broadly beginning in the 1960s, the only-example of the federal government granting an exemption to conscientious objectors whose objections may not have been based on religious belief. Congress did not authorize exemptions for this broader category under the 1917 act and the subsequent history of the conscientious objector exemption from the draft reveals that Congress consistently has refused to extend the draft law's conscientious objector exemption beyond those objections based on religious belief.

When Congress passed the Selective Training and Service Act of 1940 in response to the expanding wars in Europe and Asia, it included an exemption for conscientious objectors.¹⁸ This act, while still limited to those subject to conscription, as opposed to soldiers already serving in the armed forces, contained four significant

¹³MONOGRAPH, *supra* note 7, at 45-47.

¹⁴Act of May 18, 1917, Pub. L. No. 65-12, § 4, 40 Stat. 76, 78 (1917).

¹⁵PROVOST MARSHAL GENERAL, SECOND REPORT OF THE PROVOST MARSHAL GENERAL TO THE SECRETARY OF WAR ON THE OPERATIONS OF THE SELECTIVE SERVICE SYSTEM TO DECEMBER 29, 1918, 56-57 (1919).

¹⁶Act of March 16, 1918, ch. 23, 40 Stat. 450 (1918); MONOGRAPH, *supra* note 7, at 59.

¹⁷MONOGRAPH, *supra* note 7, at 55.

¹⁸Selective Training and Service Act of 1940, Pub. L. 76-783, § 5(g), 54 Stat. 885, 889 (1940).

changes from the conscientious objector exemptions in prior draft laws. The law extended eligibility for conscientious objector status to persons whose objections were based on "religious training and belief" instead of limiting eligibility to pacifist sects only.¹⁹ The law permitted an applicant to appeal a denial of his claim by the local board.²⁰ The 1940 Act also authorized alternative civilian service for conscientious objectors so that they never would be inducted into the military.²¹ Finally, this alternative service was not subject to military control or supervision.²²

The Selective Service System created by the 1940 Act processed 34,506,923 registrants, of whom approximately 72,000 received, or were eligible for, conscientious objector status.²³

President Truman requested, and Congress approved, the nation's first true peacetime draft in 1948.²⁴ This law retained the conscientious objector exemption from the 1940 Act with the addition of a definition of the requirement that a registrant's conscientious objections derive from "religious training and belief." The 1948 Act defined this requirement as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation . . ."²⁵ Congress amended the 1948 Act with the Universal Military Training and Service Act of 1951, but did not change the conscientious objector exemption.²⁶ Accordingly, the 1948 Act's exemption remained in effect into the era of the United States involvement in the war in Vietnam. Congress again amended the 1948 Act in the Military Selective Service Act of 1967.²⁷ The 1967 amendment included the conscientious objector exemption, but without the reference to a "Supreme Being."²⁸ The 1948 Act, as amended, continues to be the draft law on which the United States' current Selective Service System is based, but authority to draft registrants under this law expired on July 1, 1973.²⁹

The entire history of conscientious objector law outlined above does not, however, address the in-service conscientious

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ MONOGRAPH, *supra* note 7, at 314-15.

²⁴ Selective Service Act of 1948, Pub. L. 80-759, 62 Stat. 604 (1948) (codified as amended at 50 U.S.C.app. §§ 451-473 (1988)).

²⁵ *Id.* at § 6(j), 62 Stat. at 612-13.

²⁶ Pub. L. No. 81-51, § 6(j), 65 Stat. 75 (1951) (codified as amended at 50 U.S.C.app. § 456(j) (1988)).

²⁷ Pub. L. No. 90-40, 81 Stat. 100 (1967) (codified as amended at 50 U.S.C. app. §§ 451-473 (1988)).

²⁸ 50 U.S.C.App. § 456(j) (1988).

²⁹ Act of Sept. 28, 1971, Pub. Law No. 92-129, § 101(a)(35), 85 Stat. 353 (1971) (codified at 50 U.S.C.app. § 467(c) (1988)).

objector. Each time Congress acted to authorize a conscientious exemption to military service, it granted that exemption in the context of compelled military service—that is, a draft. Neither the current draft law, nor any of its predecessors, ever provided a means for the soldier serving on active duty to apply for a change in duties or a discharge because of his or her conscientious objections to continued military service.

The Department of Defense first acted to accommodate the interests of the in-service conscientious objector in 1951 when it promulgated a directive authorizing reassignments to noncombatant duties for soldiers conscientiously opposed to further combatant service.³⁰ In 1962, the Department of Defense issued a superseding directive providing a mechanism for active-duty soldiers possessing religiously based conscientious objections to continued service to either seek transfers to noncombat service or a discharge from the military.³¹ The current version of this mechanism is a Department of Defense Directive codified in the Code of Federal Regulations with implementing regulations in each of the services.³² Thus, the law creating the in-service conscientious objector program is a creature of executive branch rule-making, rather than an act of Congress.

Although the in-service conscientious objector program is not legislatively created, the law of conscientious objection arising from the Selective Service Act has influenced greatly the development and application of the in-service conscientious objector program. The Department of Defense directive at one time explicitly stated that the same standards used to determine conscientious objector status of Selective Service System registrants would apply to in-service claimants.³³ The United States Supreme Court relied on this language to find that the standards

³⁰ DEP'T OF DEFENSE, DIRECTIVE No. 1315.1, (June 18, 1951).

³¹ DEP'T OF DEFENSE, DIRECTIVE 1300.6, CONSCIENTIOUS OBJECTORS (21 Aug. 1962); see also Robert E. Montgomery, Jr., Comment, *God, The Army and Judicial Review: The In-Service Conscientious Objector*, 56 CAL. L. REV. 379, 401 n.92 (1968) (citing a letter from Major General Kenneth G. Wickham, the Adjutant General of the Army to the author, dated Dec. 7, 1976, on file with the *California Law Review*).

³² 32 C.F.R. § 75 (1992); DEP'T OF DEFENSE, DIRECTIVE 1300.6, CONSCIENTIOUS OBJECTORS (Aug. 20, 1971), *implemented in the Army by DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION* (Aug. 1, 1983) [hereinafter *AR 600-43*].

³³ *Department of Defense Directive Number 1300.6* states the following:

Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining [conscientious objector status] of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering the military service.

DEP'T OF DEFENSE, DIRECTIVE No. 1300.6, CONSCIENTIOUS OBJECTORS (May 10, 1968), *superseded by* DEPARTMENT OF DEFENSE, DIRECTIVE No. 1300.6, CONSCIENTIOUS OBJECTORS (Aug. 20, 1971) (codified at 32 C.F.R. § 75 (1992)).

found in the Selective Service Act's conscientious objector exemption, as construed by the courts, are the same standards that apply to the case of the in-service objector.³⁴ The current directive incorporates concepts in its definitions and standards that were derived from case law interpreting similar provisions in the draft law conscientious objector exemption, such as the definition of "religious training and belief."³⁵

Consequently, the military's current program authorizing applications for reassignments or discharge on the basis of conscientious objections to military service continues a national tradition of accommodating religious conscientious objections. This program, while separate from the longer history of the draft-based conscientious objector programs, draws its basic policy and fundamental standards from that history.

III. The Current In-Service Conscientious Objector Program

The Department of Defense directive concerning in-service conscientious objectors accomplishes three purposes. It establishes an in-service program implementing the national policy of respecting religious-based conscientious objections to military service. In addition, it outlines the standards for evaluating conscientious objector claims—standards that derive from the draft law conscientious objector exemption. Finally, it specifies the responsibilities of the soldier applying for conscientious objector status and of the military as it investigates that claim.

A. Standards Applicable to the In-Service Conscientious Objector

The in-service conscientious objector program borrows all of its principle definitions and standards from the standards created by Congress for the draft law conscientious objector exemption or created by the courts in interpreting that exemption.

The directive defines "conscientious objection" as "A firm, fixed and sincere objection to participation in war of any form or

³⁴*Gillette v. United States*, 401 U.S. 437, 442 (1971); see also *Ehlert v. United States*, 402 U.S. 99, 107 (1971) (stating that the Court's decision is predicated on its understanding that either the local draft board or the military would provide a claimant with a full opportunity to present a conscientious objection claim and that the same criteria would apply to an in-service conscientious objection claim as to a claim under the Selective Service Act).

³⁵See, e.g., 32 C.F.R. § 75(C) (1992) (defining "religious training and belief," in part, as "a sincere and meaningful belief which occupies in the life of the possessor a place parallel to that held by the God of another" which is a near quote of Justice Clark's standard for the Selective Service Act's provision requiring "religious training and belief," as "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the god of those admittedly qualifying for the exemption" *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

the bearing of arms, by reason of religious training and belief."³⁶ This definition incorporates the basic principles of the Selective Service conscientious objection section that exempts any person "from combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form."³⁷

The directive incorporates these principles into its statement of the criteria for qualification for reassignment or discharge under the in-service conscientious objector program. The military services may approve an application for conscientious objector status for any soldier:

- (1) Who is conscientiously opposed to participation in war in any form;
- (2) Whose opposition is based on religious training and beliefs; and
- (3) Whose position is sincere and deeply held.³⁸

The first criterion comes directly from the statutory definition of conscientious objection and has been enforced rigorously by courts reviewing conscientious objection cases.³⁹ The second and third criteria, however, have been influenced heavily by judicial interpretation of the draft law conscientious objector exemption.

The second criterion, like the first, comes directly from the statutory definition of conscientious objection, but the Supreme Court has adopted an expansive interpretation of the concept "religious training and belief." In *United States v. Seeger*,⁴⁰ and later in *Welsh v. United States*,⁴¹ the Court interpreted the phrase to embrace more than what one might consider traditional notions of "religion." *Seeger* concluded that "religious training and belief," while still excluding personal moral codes and political or sociological considerations, embraces a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption"⁴² *Welsh* abandoned any remaining reliance on traditional concepts of religion in the context of conscientious objection by holding that purely moral or ethical beliefs—or even essentially political, sociological, or philosophical views—may qualify as "religious training or belief" under

³⁶ 32 C.F.R. § 75.3(a) (1992).

³⁷ 50 U.S.C. app. § 456(j) (West Supp. 1992).

³⁸ 32 C.F.R. § 75.5(a) (1992).

³⁹ *Gillette v. United States*, 401 U.S. 437, 441-47 (1971).

⁴⁰ *Seeger*, 380 U.S. at 176.

⁴¹ *Welsh v. United States*, 398 U.S. 333, 340 (1970).

⁴² *Seeger*, 380 U.S. at 176.

the *Seeger* formula.⁴³ The directive subsequently incorporated these judicial interpretations into its definition of “religious training and belief.”⁴⁴

Finally, the third criterion is not found in the statutory program, but has been adopted by the courts as an implied requirement for conscientious objector status. Once the applicant demonstrates a conscientious objection to war in any form based on “religious training and belief,” the remaining issue becomes whether the applicant is sincere in this belief.⁴⁵

Thus, each of the three criteria used by the in-service conscientious objector program to evaluate conscientious objector claims—each of which incorporates concepts that constitute the heart of the in-service program—come directly from the draft law conscientious objection exemption.

Likewise, the classification scheme used in the in-service program tracks the scheme developed in the draft law exemption. The directive classifies conscientious objectors as one of two types: Class 1-A-O objectors whose conscientious objections prevent them from combatant service, but would permit noncombatant service; and Class 1-O objectors whose conscientious objections preclude any military service.⁴⁶ These classifications track the categories found in the Selective Service regulations classifying registrants under that program.⁴⁷

The in-service conscientious objector program, though established as a Department of Defense regulatory program, relies on the law of conscientious objection in the draft context for the program’s substantive definitions and criteria.

⁴³*Welsh*, 398 U.S. at 340-343.

⁴⁴The directive’s definition includes concepts from both *Seeger* and *Welsh*:
(b) *Religious training and belief*

Belief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or being need not be of an orthodox deity, but may be a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of another, or in the case of deeply held moral or ethical beliefs, a belief held with the strength and devotion of traditional religious conviction. The term “religious training and belief” may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as “religious” in the traditional sense, or may expressly characterize them as not religious. The term “religious training and belief” does not include a belief which rests solely upon considerations of policy, pragmatism, expediency or political views.

32 C.F.R. § 75.3(b) (1992).

⁴⁵*Witmer v. United States*, 348 U.S. 375, 381 (1955).

⁴⁶32 C.F.R. § 75.3(a)(1), (2) (1992).

⁴⁷*Id.* §§ 1630.11, 1630.16.

B. Policies and Procedures Under the In-Service Conscientious Objector Program

The Department of Defense policy concerning in-service conscientious objection begins with the statement that administrative discharge prior to completion of an obligated term of active duty because of conscientious objections is discretionary with the service involved.⁴⁸ The military will grant conscientious objector status under the program, and either release a soldier from military duty or restrict duties "to the extent practicable and equitable ..." but only when these actions would be consistent with military effectiveness and efficiency.⁴⁹ By its terms, the in-service conscientious objector program does not create a regulatory right to conscientious objector status.

The directive includes the significant limitation that soldiers who possessed conscientious objection beliefs prior to entering active duty are not eligible for conscientious objector status under this program.⁵⁰ The directive, however, qualifies this limitation by disallowing these claims only when the individual failed to claim exemption under the Selective Service System or was denied status under the Selective Service System.⁵¹ This qualification is meaningless since the Selective Service System currently does not accept or process claims for conscientious objector status under the draft law. The individual services have attempted to remedy this defect in their implementing regulations. The service regulations state that they will deny claims when the claimant possessed the beliefs prior to entry on active duty and failed to present a claim for status prior to dispatch of the notice of induction, enlistment, or appointment.⁵²

The military service investigates each conscientious objector claim separately to determine whether the claimant satisfies the three criteria for conscientious objector status.⁵³ The claimant bears the burden of proving by clear and convincing evidence that he or she satisfies these three criteria.⁵⁴

The directive outlines specific procedures an applicant and the military service must follow in submitting and processing a claim for conscientious objector status. The claimant must provide specific personal information in support of his or her claim and is

⁴⁸*Id.* § 75.4(a).

⁴⁹*Id.*

⁵⁰*Id.* § 75.4(a)(1).

⁵¹*Id.*

⁵²See AR 600-43, *supra* note 32, para. 1-7.

⁵³See *supra* note 36; 32 C.F.R. §§ 75.4(b), 75.5(a) (1992)

⁵⁴*Id.* § 75.5(d).

entitled to submit any additional matters that he or she believes would be helpful in supporting the claim.⁵⁵ The directive requires an interview of the claimant by a chaplain, who must submit a written opinion of the basis of the claim and of the claimant's sincerity and depth of conviction.⁵⁶ The directive also requires an interview by a psychiatrist, who must submit a report of psychiatric evaluation to determine whether the claimant possesses any emotional or personality disorder that would warrant disposition through medical channels.⁵⁷

Once the claimant has submitted an application for conscientious objector status and the required interview reports are completed, a commander designated by the service regulation will appoint an investigating officer outside the claimant's chain of command.⁵⁸ The investigating officer will conduct an informal hearing, the purpose of which is to give the claimant an opportunity to present evidence, to generate a complete record of relevant information, and to facilitate an informed recommendation by the investigating officer and an informed decision by the final decision authority.⁵⁹ The claimant may be represented by counsel whom he or she procures, may present any evidence including written statements and testimony of witnesses, and may question witnesses called by the investigating officer.⁶⁰ The investigating officer may receive any evidence relevant to the claim.⁶¹

Once the investigation is complete, the investigating officer must complete a report of investigation. This report must include all statements and other material assembled, a summary of the hearing testimony, the investigating officer's conclusions and reasons for those conclusions concerning the basis and sincerity of the claimant's stated conscientious objections, and a recommendation for disposition of the claim.⁶² The investigating officer will forward the report of investigation through command channels to the approval authority.

The services have adopted different approval authorities for conscientious objector claims. The Army permits general court-martial convening authorities to approve applications for non-combatant status, while a department-level panel of officers (Conscientious Objector Review Board) must review all claims for

⁵⁵*Id.* §§ 75.6(a), 75.9.

⁵⁶*Id.* § 75.6(c).

⁵⁷*Id.*

⁵⁸*Id.* § 75.6(d).

⁵⁹*Id.* § 75.6(d)(2).

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.* § 75.6(d)(3).

discharge and claims denied by the general court-martial convening authority.⁶³ The Marine Corps and the Air Force use similar boards as final decision authorities in conscientious objector cases, while the Navy assigns this responsibility to the Chief of Personnel.⁶⁴

Pending the final decision on a conscientious objector claim and to the extent practical, the military service must make every effort to assign the claimant to duties that will conflict as little as possible with the claimant's stated beliefs.⁶⁵ Nevertheless, the claimant remains subject to military orders and discipline pending a final decision on the claim.⁶⁶ The military will grant a discharge for the convenience of the government to claimants whose request for discharge as a conscientious objector is approved by the decision authority.⁶⁷ The type of discharge issued will depend on the claimant's military record and service standards for classification of discharges.⁶⁸ Claimants assigned to noncombatant duties based on an approved claim of conscientious objection and those denied their claims remain subject to military control and discipline and will be expected to perform assigned duties.⁶⁹ Finally, commanders may return without action second or subsequent claims based on essentially the same evidence or asserted beliefs as in previous claims.⁷⁰

This overview demonstrates how the directive accomplished three essential purposes. It established an in-service conscientious objector program consistent with national policy respecting religious-based conscientious objections. Furthermore, it established standards to evaluate claims of conscientious objection. Finally, it identified the responsibilities of the claimant and the military department in submitting and adjudicating the claim.

Nevertheless, the directive, as currently configured, does not reflect the changes that have occurred in the military and in the law as it relates to the military over the past twenty years. In addition, the directive fails to account for the continuing and fundamental restructuring in the nation's defense policy and military forces.

⁶³AR 600-43, *supra* note 32, at para. 2-8.

⁶⁴Telephone interview with Mr. Jack Perrago, Investigator, Government Accounting Office (Feb. 11, 1993) [hereinafter GAO interview]. During late 1992 and early 1993, Mr. Perrago was conducting a review of the Dep't of Defense conscientious objector program at the direction of the House Committee on Armed Services.

⁶⁵32 C.F.R. § 75.6(h) (1992).

⁶⁶*Id.*

⁶⁷*Id.* § 75.7.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* § 75.5(g).

These changes require the military to reexamine the in-service conscientious objector program. President Clinton's words addressing the need for restructuring the government in other contexts apply with equal force in evaluating the in-service conscientious objector program: "We must start thinking about tomorrow."⁷¹

IV. Does a Conscientious Objector Program Have a Place in a Volunteer Force?

The logic of providing a program that allows soldiers who voluntarily join the military to seek reassignment or discharge based on sincerely held conscientious objections to further military service may seem questionable. Although the concept of providing a conscientious objector program to volunteers may seem counter-intuitive at first glance, several enduring justifications support such a program.

A. Justifications for Continuing an In-Service Conscientious Objector Program in the Volunteer Force

As the history of the in-service conscientious objector program demonstrated, Congress repeatedly has expressed its conviction that those whose religious beliefs preclude them from engaging in military service ought to be exempt from compulsory military service. The Department of Defense directive restates this tradition as "a national policy to recognize the claims of bona fide conscientious objectors in the military service . . ."⁷² This policy gives expression to deeply held national values and recognizes some pragmatic issues.

Exempting religious conscientious objectors from military service comports with the nation's commitment to religious freedom. This is particularly true when religious beliefs conflict with actions directed by the government, such as killing other people, which can force individuals to confront their most fundamental values and beliefs.⁷³ Providing an exemption for conscientious objectors furthers two important values central to the United States' national identity: the libertarian ideal of respecting individual differences, especially those founded on religious belief; and the democratic ideal of tolerating varied ideas and opinions.⁷⁴

⁷¹President William J. Clinton, Address to a Joint Session of the U.S. Congress (Feb. 17, 1993).

⁷²32 C.F.R. § 75.5(a) (1992).

⁷³Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 *Sup. Ct. Rev.* 31, 47 (1971).

⁷⁴Michael P. Seng, *Conscientious Objection: Will the United States Accommodate Those Who Reject Violence as a Means of Dispute Resolution?*, 23 *SETON HALL L. REV.* 121, 123 (1992).

A policy recognizing religious conscientious objections to military service also recognizes some pragmatic issues that accompany such beliefs. Soldiers who harbor deeply held, conscientious objections to military service will tend to have difficulty serving successfully and may hurt the morale of other soldiers in the unit. Furthermore, devoting the military's training efforts and resources to those soldiers who are most able to contribute to the military mission simply makes sense.

These considerations favoring a conscientious objector program are present even in a volunteer force. Although the vast majority of persons having conscientious objections to military service will avoid conflict with those beliefs by simply not entering the military,⁷⁵ soldiers can develop such objections after entering the military.

The majority of persons joining the military do so in their late teens and early twenties at a time when their belief systems are being formed.⁷⁶ This reality, along with the many benefits they seek from a military career, can lead to their not recognizing the full implications of military service until after they have been in uniform for some time and their belief systems have had time to mature.⁷⁷ In other instances, soldiers experience mid-life changes, such as marriage to a spouse belonging to a different religious faith or joining a church. These events lead them to adopt, as their own, beliefs that are inconsistent with continued military service.⁷⁸ Both circumstances demonstrate how soldiers can find themselves in situations in which changes in their belief systems conflict with continued military service.

B. Examining the Arguments Against an In-Service Conscientious Objector Program in the Volunteer Force

Naturally, several arguments militate against providing an exemption for conscientious objectors. Professor Kent Greenawalt, in a detailed analysis of selective conscientious objection, identified the principle arguments against an exemption for conscientious objectors as follows:

It is unjust to excuse selected individuals from a general obligation, particularly one that exposes those not excused to danger or significant hardship.

⁷⁵Telephone interview with Colonel Duane Lempke, Assistant President, Department of the Army Conscientious Objector Review Board (Mar. 1, 1993) [hereinafter Lempke interview].

⁷⁶GAO interview, *supra* note 64.

⁷⁷*Id.*; Lempke interview, *supra* note 75.

⁷⁸Telephone interview with Captain Flora D. Darpino, Army Litigation Attorney (Mar. 1, 1993) [hereinafter Darpino interview]. Captain Darpino was the Judge Advocate Officer member of the Department of the Army Conscientious Objector Review Board for approximately two years including the periods before, during and after Operations Desert Shield and Desert Storm.

Those not exempted may perceive themselves as victims of an injustice and their morale may suffer.

An exemption may interfere with the nation's ability to draw sufficient manpower for the military mission.

Defining the class of persons eligible for exemption and determining sincerity will be so difficult that administering the exemption program will be unfair.

Allowing the exemption will undermine the government's moral authority to wage war and encourage other claims for relief from governmental obligations because of conscientious objections.⁷⁹

Most of these arguments against a conscientious objector program, however, are unpersuasive when applied to the United States' experience with the in-service conscientious objector program.

Addressing the first two of Greenawalt's arguments against an exemption, the history of congressional support for a conscientious objection exemption demonstrates a broad consensus that the nation ought to exempt religious-based conscientious objectors from compulsory military service.⁸⁰ Extending a similar exemption to in-service conscientious objectors who develop their beliefs while serving in the military would be consistent with this national consensus. This consensus shows a willingness to tolerate the injustice that results from exempting certain individuals from participating in "the common defense"⁸¹ so long as the exemption furthers a respected national value such as religious freedom.⁸² In addition, concern over the injustice of excusing some from further service is arguably less pressing in a volunteer force in which the society at large is not placed in jeopardy of being required to serve in the place of one exempted under the conscientious objector policy.

Greenawalt's third objection—that an exemption creates military manpower problems—has not presented a problem in the in-service program. The in-service conscientious objector program,

⁷⁹Greenawalt, *supra* note 73, at 48.

⁸⁰See *supra* Part 11; see also Greenawalt, *supra* note 73, at 48 ("[T]his society has a substantial consensus that [conscientious objectors] should not be conscripted"); Douglas Sturm, *Constitutionalism and Conscientiousness: The Dignity of Objection to Military Service*, 1 J. LAW & REL. 265, 267 (1983) ("[T]he principle of exempting those conscientiously opposed to war from military service is a long-standing and deep-seated tradition of the American republic").

⁸¹U.S. CONST. preamble.

⁸²See MONOGRAPH, *supra* note 7, at 5.

even as broadened by judicial opinions, has not posed a threat to military readiness.⁸³ The numbers of soldiers applying for conscientious objector status under the current program never has been statistically significant.⁸⁴

On the other hand, two different circumstances could lead to readiness problems. First, as the military force shrinks, it becomes more vulnerable to unplanned personnel losses, particularly among key personnel. Second, if the current program were changed to loosen its eligibility criteria, past experience would not be useful in predicting the possible impact on readiness and the program could pose a threat to military readiness.

The fourth objection Greenawalt raises to providing an exemption has posed problems in the past and continues to pose real difficulties. Defining the class of soldiers eligible for the in-service exemption has proven exceedingly difficult and, as a result, very controversial.⁸⁵ Similarly, administering the program has proven difficult and has led to inconsistency at the level of

⁸³Telephone interview with Colonel (ret.) Tyler Tugwell, former President, Department of the Army Conscientious Objector Review Board (Mar. 2, 1993) [hereinafter Tugwell interview]; GAO interview, *supra* note 64.

⁸⁴During the height of the Vietnam War and during Operations Desert Shield and Desert Storm, the number of applications increased significantly. Nevertheless, the persons making these applications never constituted a statistically significant portion of the military force. *See supra* note 3 (listing statistics reported for conscientious objector claims before, during and after Desert Shield/Desert Storm). The Army recorded the following figures for in-service conscientious objector claims during the years 1961-1971:

Year	Applications	Approvals
1961	8	1
1962	5	2
1963	69	29
1964	62	30
1965	101	26
1966	118	5
1967	185	9
1968	282	70
1969	243	194
1970	1106	357
1971	1525	879

George Stohner, *United States v. Lennox—The End of the Noyd Era in Military Law*, 58 MIL L. REV. 241, 262 n.136 (1972).

⁸⁵*See* *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437, 456-458 (1971); Mary P. Sullivan, Comment, *Conscientious Objection in an All-Volunteer Military: An Impermissible Accommodation of Religious Freedom?*, 43 MERCER L. REV. 751 (1992); Donald N. Zillman, *In-Service Conscientious Objection: Courts, Boards and the Basis in Fact*, 10 SAN DIEGO L. REV. 108 (1972); Greenawalt, *supra* note 73; John T. Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A. L. REV. 975 (1970); David M. Brahms, *They Step to the Beat of a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-A-Vis In-Service Conscientious Objectors*, 47 MIL. L. REV. 1 (1970); Montgomery, *supra* note 31.

the hearing officer investigating the claim⁸⁶ and to charges of unfairness.⁸⁷

As to Greenawalt's final two objections to an exemption, little evidence supports the conclusion that past exemption programs have detracted from the government's moral force to wage war. Although the war in Vietnam became immensely unpopular, many factors influenced public opinion against that war effort far more than the fact that several hundred soldiers were discharged, or that even several thousand selective service registrants were exempted, from military service annually on grounds of conscientious objection to military service.⁸⁸ Active conscientious objector programs in both the United States and Great Britain during World War II did not seem to undercut the moral authority of these governments in waging that war.⁸⁹

Finally, the fact that the United States exempts conscientious objectors from continued military service apparently has not weakened the nation's ability to deny other, similar claims for exemption not supported by a similar national consensus. Recent cases have denied exemptions from tax laws and controlled substance laws even when the affected individuals claimed that religious-based conscientious objections supported their actions.⁹⁰

An in-service conscientious objector policy serves several purposes, even in a volunteer force. Although this discussion demonstrates that drawbacks to adopting such a program exist, the purposes it serves endure.

An in-service conscientious objector program continues a longstanding national policy to recognize religious-based conscientious objection to military service, thereby supporting the national

⁸⁶Interview with Captain Sean Freeman, United States Marine Corps, Student at the Judge Advocate Officer Graduate Course, in Charlottesville, VA (Feb. 10, 1993) [hereinafter Freeman interview]. Captain Freeman served as an investigating officer in a conscientious objector case at Camp Pendleton, CA. Telephone interview with Major Diana Moore, Army Litigation Attorney (Feb. 3, 1993) [hereinafter Moore interview]. Major Moore served as the Army's litigator before the federal courts trying lawsuits that challenged the Army's denial of conscientious objector status. Darpino interview, *supra* note 78.

⁸⁷Seng, *supra* note 74, at 135, 150.

⁸⁸See *supra* note 84 (reporting figures of in-service objectors discharged during the Vietnam war period); Greenawalt, *supra* note 73, 49 (commenting on the low percentage of registrants exempted under the conscientious objector exemption).

⁸⁹See Monograph, *supra* note 7, at 1, 5; Greenawalt, *supra* note 73, at 56-57.

⁹⁰United States v. Lee, 455 U.S. 252 (1982) (upholding the obligation of members of the Old Order Amish to pay Social Security taxes even though doing so violates their religious-based beliefs); Oregon v. Smith, 494 U.S. 872 (1990) (upholding state's controlled substances law even against claims of religious exemptions for ceremonial purposes); Nelson v. United States, 796 F.2d 164 (6th Cir. 1986) (upholding the government's prosecution of a "war tax" protestor in the face of his claimed conscientious objections to his taxes being used for military purposes).

values of religious freedom, individual liberty, and democratic pluralism. An in-service conscientious objector program acknowledges and avoids the difficulties inherent in attempting to coerce military service from an individual whose deeply-held religious beliefs preclude such service. Finally, an in-service conscientious objector program acknowledges the reality of change in people's belief systems that sometimes can lead to religious conflicts with continued military service.

Consequently, an in-service conscientious objector program is desirable, if not necessary, for deeply-held national policy reasons and to acknowledge that people can change in significant ways during a military career. Nevertheless, the current program runs a foul of several of the arguments for and against exempting conscientious objectors from military service.

The next section analyzes the ways in which the current program falls short both in meeting the need for such a program and in avoiding the arguments against having such a program. First, the current program is overinclusive, thereby exempting soldiers whose claimed beliefs fall outside the national consensus concerning what justifies an exemption. Second, the current program's overinclusivity could lead to readiness problems as the military shrinks and redefines its mission. Third, the current program poses administrative problems caused, in part, by obscure definitions and standards that have not changed even though the military and applicable law have changed. Finally, the current program fosters a perception of unfairness when sincere objectors benefit from military education or training only to receive a discharge before the military receives the benefit of their newly acquired skills.

V. Analyzing Where the Current In-Service Conscientious Objector Program Fails and Proposing a Remedy

A. *The Problem of Being Overinclusive or "Religious Training and Belief" as a Standardless Standard*

The requirement that conscientious objections arise from religious training and belief has been a central requirement imposed by Congress throughout the history of the exemption. This requirement is consistent with the national tradition of respect for deeply held religious convictions, even when members of the majority may not understand or approve of them. This requirement is also central to the national consensus that tolerates the injustice of releasing some from a period of obligated military service that they voluntarily assumed, when others who

also assumed a service obligation are not released. The current program retains the requirement that a claimant's conscientious objections be based on "religious training and belief."⁹¹ Nevertheless, the manner in which the program defines the term broadens the exemption beyond the scope of the national consensus that supported the creation of these exemptions in the first place.

The current program defines "religious training and belief" to include beliefs based solely on ethical, philosophical, and merely personal moral considerations.⁹² This broad exemption is not supported by a national consensus favoring such an exemption. Such a broad definition is not required by constitutional considerations, nor is it justified in a volunteer military.

The overinclusive definition of "religious training and belief" raises several problems. It contributes to a sense of injustice in the program because some soldiers who qualify for discharge or reassignment appear to fall outside the national consensus concerning who ought to serve and who ought to be released from serving based on conscientious beliefs. It presents an ever greater potential to impair military readiness in an era of a shrinking military force that coincidentally must expand its crisis response mission. It contributes to difficulties in administering the program by introducing uncertainty and ambiguity to the military's factfinding and decision making under the program. Finally, it contributes to the potential for fraud or unfairness under the program by placing a premium on claimant preparation and coaching. This favors claimants who are able to retain counsel or consult with antiwar groups as well as those claimants who are educated and articulate.

1. Unwarranted Judicial Activism Created the Overinclusive Standard. — The definition of "religious training and belief" in the in-service conscientious objector program is a prosecutor's nightmare and a defense counsel's dream because of the standard's breathtaking ambiguity. The definition reads as follows:

Belief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or being need not be of an orthodox deity, but which may be a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of another, or, in the case of deeply held moral or ethical beliefs, a belief held with the strength and devotion of traditional religious

⁹¹ 32 C.F.R. § 75.5(a) (1992).

⁹² *Id.* § 75.3(b).

conviction. The term "religious training and belief" may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not religious. The term "religious training and belief" does not include a belief which rests solely upon considerations of policy, pragmatism, expediency, or political views.⁹³

Anyone who surmises from this language that attorneys were involved in creating this collage of religion-philosophy-sociology, is correct. As mentioned above,⁹⁴ this standard comes from the opinions in *United States v. Seeger*⁹⁵ and *Welsh v. United States*⁹⁶ in which the Supreme Court interpreted the same term in the Selective Service Act.⁹⁷

(a) The Case of *United States v. Seeger*.—Congress defined the term "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological or philosophical views or a merely personal moral code."⁹⁸ The Supreme Court believed the term required further interpretation.

Writing for a unanimous Court, Justice Clark resolved the issue as a matter of statutory interpretation, rather than as a Constitutional issue. Early in the opinion, Justice Clark gave an indication of the care with which he intended to treat the words and intent of Congress when he substituted the word "economic" for "philosophical" in the statute's list of beliefs that would not qualify for the exemption.⁹⁹

Congress added the definition of "religious training and belief" to the conscientious objector exemption in the Selective

⁹³*Id.*

⁹⁴*See supra* Part IIIA.

⁹⁵380 U.S. 163 (1965).

⁹⁶398 U.S. 333 (1970).

⁹⁷Both cases involved claims of conscientious objection under § 6(j) Selective Service Act of 1948, Pub. L. No. 80-759, § 6(j), 62 Stat. 604, 612-13 (codified as amended at 50 U.S.C. app. § 456(j) (1988))(The 1951 amendments did not change the Conscientious Objector exemption).

⁹⁸*Id.*

⁹⁹The *Seeger* opinion's characterization of persons excluded under the statute differs from the language of the statute itself. Compare *United States v. Seeger*, 380 U.S. at 173 ("The section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological, or economic considerations . . .") (emphasis added) with Selective Service Act of 1948, Pub. L. No. 80-759 § 6(j), 62 Stat. 604, 612 (1948) ("Religious training and belief in this connection . . . does not include essentially political, sociological or philosophical views or a merely personal moral code") (emphasis added).

Service Act of 1948.100 Justice Clark referred to the Senate Report on the 1948 Act as indicating an intent to re-enact “substantially the same provisions as were found in the 1940 Act” which had not defined “religious training and belief.”¹⁰¹ Armed with this statement of congressional intent and the definition of religion from *Webster’s New International Dictionary*, Justice Clark concluded, “A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.”¹⁰² This new definition included claimants whose conscientious objections were unrelated to any supreme being or even any acknowledgement of a supernatural component to life.

In reaching its definition, the Court impliedly concluded that Congress’s addition of the words “belief in relation to a Supreme Being” had no meaning and did not qualify or define the term Congress expressly intended them to qualify or define. Congress logically intended the words to carry some meaning and commentators have reached this same conclusion.¹⁰³ The evidence indicates that Congress intended a more limited definition of “religious training and belief,”—one consistent with traditional concepts of religion including a theistic component.

The Senate Report accompanying the 1948 amendment explained the exemption as extending “to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service.”¹⁰⁴ The Senate specifically referred to the case of *United States v. Berman*¹⁰⁵ as defining who is eligible for the exemption based on “religious training and belief.” The logical inference from this reference is that the *Berman* case clearly supports the proposition for which it was cited.¹⁰⁶ Congress used *Berman* to clarify the meaning of “religious training and belief” in the context of eligibility for an exemption as a conscientious objector.

¹⁰⁰ Selective Service Act of 1948, Pub. L. No. 80-759, § 6(j), 62 Stat. 604, 612-13 (1948).

¹⁰¹ 380 U.S. at 176.

¹⁰² *Id.*

¹⁰³ See George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion”*, 71 GEO. L. J. 1519, 1526 (1983); Greenawalt, *supra* note 73, at 38.

¹⁰⁴ S. REP. NO. 1268, 80th Cong., 2d Sess. 13 (1948), reprinted in 1948 U.S.C.C.S. 1989, 2002 (citing *United States v. Berman*, 156 F.2d 377 (9th Cir.) (citation omitted), cert. denied, 329 U.S. 795 (1946)).

¹⁰⁵ *United States v. Berman*, 156 F.2d 377 (9th Cir. 1946), cert. denied 329 U.S. 795.

¹⁰⁶ See Greenawalt, *supra* note 73, at 38; Michael Asimow, *Selective Service 1970*, 17 U.C.L.A. L. REV. 893, 896 (1970).

The Berman case interpreted the meaning of "religious training and belief" as found in the Selective Service Act of 1940.¹⁰⁷ The Berman court concluded that "religious training and belief" was plain language that Congress used to distinguish between "conscientious social belief, or a sincere devotion to a high moralistic, philosophy, and one based upon a belief in his responsibility to an authority higher and beyond any worldly one."¹⁰⁸ The court cited with approval the definition of religion that Chief Justice Hughes used in his dissent in *United States v. Macintosh*¹⁰⁹—the same definition the Congress subsequently adopted for the conscientious objector exemption and used in the Senate Report on the 1948 Act.¹¹⁰ The Berman court's broadest reference to the essence of religion required a recognition that religion involved not a unilateral human process, but a "vital and reciprocal interplay between the human and the supernatural."¹¹¹ Congress's reference to Berman is all the more significant because another federal circuit had adopted a broader interpretation of the same definition prior to the Berman case.¹¹²

Justice Clark, writing in *Seeger*, explained Congress's reference to Berman by saying the reference could have meant any number of things.¹¹³ His explanation was disingenuous, however, because it ignored not only the context of the reference, but also Congress's choice of the narrower of two judicial interpretations of the statutory standard. Congress intended, at a minimum, that the "religious training and belief" language mandated that the conscientious objection arise from an acknowledgement of human obligations owed a supernatural entity or reality. Justice Clark's opinion removed any such requirement from the statute, thereby making it something quite different from what Congress intended. Justice Harlan later repudiated his vote in *Seeger*, describing the opinion as "a remarkable feat of judicial surgery to remove . . . the theistic requirement of § 6."¹¹⁴

(b) *The Case of Welsh v. United States.*—The Supreme Court, in *Welsh v. United States*¹¹⁵ completed the secularization of "religious training and belief" begun in *Seeger* five years earlier. Like the Court's opinion in *Seeger*, *Welsh* resolved the

¹⁰⁷ Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889 (1940).

¹⁰⁸ 156 F.2d at 380.

¹⁰⁹ 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting on other grounds).

¹¹⁰ See *supra* text accompanying notes 97, 104.

¹¹¹ 156 F.2d at 382.

¹¹² *United States v. Kauten*, 133 F.2d 703 (2d. Cir. 1943).

¹¹³ 380 U.S. at 178.

¹¹⁴ *Welsh v. United States*, 398 U.S. 333, 351 (1970) (Harlan, J., dissenting).

¹¹⁵ 398 U.S. 333 (1970).

issue as a matter of statutory interpretation, not as a constitutional issue. Writing for a four-member plurality, Justice Black effectively erased “religious training and belief” as a separate requirement for qualification under the statutory exemption.

Justice Black’s opinion held that the *Seeger* standard for “religious training and belief” included “beliefs that are purely ethical or moral in source and content but that nevertheless impose upon [the believer] a duty of conscience to refrain from participating in any war at any time . . .”¹¹⁶ Justice Black used two arguments to avoid the specific statutory exclusions of “essentially political, sociological or philosophical beliefs or merely personal moral code.” First he identified beliefs that fell within these exclusions as beliefs that were not deeply held and beliefs that did not rest at all upon moral, ethical, or religious principles, but rather were based solely on considerations of policy, pragmatism, and expediency.¹¹⁷ He then employed a Houdini-like logic to conclude that a claimant found to be “religious” under the newly-expanded definition of that term, could not be excluded based on views that were essentially political, sociological, or philosophical or merely a personal moral code.¹¹⁸

Unlike *Seeger*, the Court in *Welsh* was divided. Justice Harlan issued a strongly worded opinion in which he concurred in the Court’s judgment because of what he perceived as a constitutional problem in the statutory definition, but disagreed with the Court’s statutory interpretation. He accused the plurality of performing a “lobotomy” on the statutory language in the case¹¹⁹ and stated that the plurality’s interpretation was unworkable except in “an Alice-in-Wonderland world where words have no meaning . . .”¹²⁰ The three remaining justices on the case dissented, agreeing with Harlan’s analysis that Congress intended to reserve the exemption to more traditional concepts of religion, but disagreeing with Harlan’s conclusion that such a limited exemption violated the First Amendment’s prohibition against the establishment of religion.¹²¹

Unlike Justice Clark in *Seeger*, Justice Black did not even bother to construct an argument that legislative history supported his conclusions. This fact did not escape the notice of commentators. Even a commentator who cheered the case’s outcome felt

¹¹⁶*Id.* at 340.

¹¹⁷*Id.* at 342-43.

¹¹⁸*Id.* at 343.

¹¹⁹*Id.* at 351 (Harlan, J., concurring).

¹²⁰*Id.* at 354.

¹²¹*Id.* at 367-74 (White, J., joined by Burger, C.J. and Stewart, J., dissenting).

compelled to point out Black's "judicial sleight of hand" in expanding the Seeger standard to include moral and ethical beliefs. That commentator concluded, "Unfortunately for those concerned for judicial constraint and logical consistency, there was no legislative history or judicial language to support Black's reading."¹²² Another writer, analyzing Black's transformation of statutory language, noted, "Perhaps the most startling aspect of this exegesis is the conversion of personal moral beliefs, explicitly excluded by the statute, into included religious beliefs."¹²³

Justice Black failed to consider evidence of Congress's intent to limit the definition of "religious training and belief" to more traditional concepts of religion. Like Seeger, Welsh dealt with the conscientious objector provision found in the Selective Service Act of 1948.¹²⁴ In 1967, however—subsequent to the decision in Seeger and almost three years before the court heard argument in Welsh—Congress passed the Military Selective Service Act of 1967.¹²⁵ The 1967 Act amended the conscientious objector exemption and the legislative history of this amendment demonstrates a clear intent to overrule legislatively the expanded definition of "religious training and belief" from Seeger.

A remarkably comprehensive Selective Service policy review preceded passage of the 1967 Act. Spurred by growing criticism of the draft and by steadily increasing draft calls to support the war in Vietnam, the House Committee on Armed Services held preliminary hearings on Selective Service reform in June of 1966.¹²⁶ Following these preliminary hearings, President Johnson established the National Advisory Commission on Selective Service (commonly referred to as the Marshall Commission after its chairman, Mr. Burke Marshall, a former Deputy United States Attorney General) to provide recommendations concerning the draft law.¹²⁷ Not wanting to be outdone, the House Committee on Armed Services established its own "blue ribbon" panel to look into Selective Service policy. The Civilian Advisory Panel on

¹²²John James Paris, S.J., *Toward an Understanding of the Supreme Court's Approach to Religion in Conscientious Objector Cases*, 7 SUFFOLK U. L. REV. 449, 455 (1973).

¹²³Greenawalt, *supra* note 73, at 42, n.38; see also Gail White Sweeney, Comment, *Conscientious Objection and the First Amendment*, 14 AKRON L. REV. 71, 76 (1980).

¹²⁴See *supra* note 97.

¹²⁵The Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (1967) (codified as amended at 50 U.S.C. app. §§ 451-71 (1988)).

¹²⁶HOUSE COMM. ON ARMED SERVICES, REVIEW OF THE ADMINISTRATION AND OPERATION OF THE SELECTIVE SERVICE SYSTEM, H.R. Doc. No. 76, 89th Cong., 2d Sess. (1966).

¹²⁷"Exec. Order No. 11,289, 31 Fed. Reg. 9265 (1966), reprinted in 1966 U.S.C.C.A.N. 4648.

Military Manpower Procurement, headed by retired General Mark W. Clark, reported its findings and recommendations to that committee on February 28, 1967.¹²⁸ President Johnson transmitted the Marshall Commission report to Congress on March 6, 1967.¹²⁹

The Civilian Advisory Panel and the Marshall Commission both addressed the question of whether the Selective Service Act ought to acquiesce to the Seeger Court's broad definition of "religious training and belief." The Marshall Commission recommended continuing the present policy as defined by *Seeger*.¹³⁰ The Civilian Advisory Panel recommended that Congress "[Almend the law to overcome the broad interpretation of the Seeger case . . .]"¹³¹ President Johnson made no comment or recommendation on this issue in his transmittal message, which accompanied the Marshall Report. Therefore, the Congress faced a clear choice on the scope of "religious training and belief" as it began hearings on the new draft law.

The hearings before the House Committee on Armed Services consumed seven days and 806 pages of testimony as the committee heard from the Director of the Selective Service, the Voters for Peace Executive Committee on the Selective Service, and all points in between.¹³² No less than eight witnesses specifically discussed the Seeger standard for "religious training and belief."¹³³ As a result, the committee certainly was informed of the significance of the opinion in *Seeger*, if any committee members were not already aware of the case.

¹²⁸HOUSE COMM. ON ARMED SERVICES, EXTENSION OF THE UNIVERSAL MILITARY AND TRAINING ACT, H.R. Doc. No. 12, 90th Cong., 1st Sess. 1914 (1967).

¹²⁹PRESIDENT LYNDON B. JOHNSON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR EXTENDING THE DRAFT AUTHORITY, LOWERING AGE FOR DRAFTING, CORRECTING THE DEFERMENT INEQUITIES, DEVELOPING A FAIR AND IMPARTIAL SYSTEM OF SELECTION, AND ESTABLISHING A TASK FORCE TO REVIEW RECOMMENDATIONS FOR A RESTRUCTURED SELECTIVE SERVICE SYSTEM, H.R. Doc. No. 75, 90th Cong., 1st Sess. (1967); BURKE MARSHALL, NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967) [hereinafter MARSHALL REPORT].

¹³⁰H.R. REP. No. 267, 90th Cong., 1st Sess. 7 (1971), reprinted in 1967 U.S.C.C.A.N. 1308, 1315.

¹³¹*Id.* at 1315.

¹³²HOUSE COMM. ON ARMED SERVICES, EXTENSION OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, H.R. Doc. No. 12, 90th Cong., 1st Sess. (1967).

¹³³The witnesses who discussed the *Seeger* standard for "religious training and belief" included General (ret.) Mark W. Clark, testifying on the recommendations of the Advisory Panel he headed; Rep. Robert W. Kastenmeier (D., Wis.); Lawrence Speiser, Director of the Washington Office of the American Civil Liberties Union; Robert D. Bulkley of the United Presbyterian Church in the USA; Sen. Edward M. Kennedy (D., Mass.); Edward L. Ericson of the American Ethical Union; Glenn Shive of the Church of the Brethren; and Lieutenant General Lewis B. Hershey, Director of the Selective Service.

Several of the witnesses before the committee testified in favor of the *Seeger* standard, but the committee repeatedly indicated dissatisfaction with *Seeger*. One committee member expressed the committee's concern with the *Seeger* standard as follows:

The relative difficulty confronting the committee and the Congress here on the question of conscientious objectors does arise in its difficulty to distinguish between a personal moral code [which the statute excludes] and the belief that one might hold which is not truly religious, but apparently meets the test of the Supreme Court decision in the *Seeger* case on the Supreme Being context How would you distinguish between a purely personal moral code and one which apparently meets and satisfies the Supreme Court test of a Supreme Being?¹³⁴

Another committee member who expressed his disapproval of the result in *Seeger*, indicated the committee's desire to overrule the case legislatively and invited General Clark to suggest how Congress ought to accomplish that goal.¹³⁵ General Clark responded by suggesting that returning to the "old language" of the 1940 Act might help.¹³⁶ The Committee Chairman, Representative Mendel Rivers, described the outcome of the *Seeger* case as "plainly ridiculous."¹³⁷

General Mark W. Clark testified and reported the unanimous findings and recommendations of the Civilian Advisory Panel. The panel's report included a finding that *Seeger* "unduly expanded the basis upon which individual registrants could claim conscientious objections to military service."¹³⁸ The Civilian Advisory Panel explained this finding further:

The Supreme Court in the *Seeger* case appears to ignore the intent of Congress which, in amending the language of the 1940 Draft Act, attempted to narrow the circumstances and more clearly define the basis for claiming conscientious objection to military service. The interpretation by the Court of the language added by Congress in this regard actually resulted in a significant broadening of the basis on which these claims can be made with the very real possibility that in the future

¹³⁴H.R. Doc. No. 12, *supra* note 132, at 2423.

¹³⁵*Id.* at 2573 (comments of Rep. Bray to Gen. Clark)

¹³⁶*Id.* at 2574.

¹³⁷*Id.* at 2637.

¹³⁸*Id.* at 2552.

there will be an ever-increasing number of unjustified appeals for exemption from military service.¹³⁹

As corrective action, the panel recommended that Congress restate the limiting language of the conscientious objector exemption “so as to eliminate the confusion caused by the Supreme Court decision” and that Congress consider returning to the original language of the 1940 Act by deleting the reference to “Supreme Being.”¹⁴⁰

Near the end of the hearings, the committee took extensive testimony from Lieutenant General (LTG) Hershey, the Director of the Selective Service. The Committee members, and in particular Chairman Rivers, engaged LTG Hershey in the following extended colloquy on how Congress might amend the statutory language to avoid the broad definition from *Seeger*:

Mr. King: To change the subject General, what do you propose about CO's? I notice you didn't mention that in your statement and it is a thing that has bothered me.

General Hershey: Well, it bothers me. I had thought, for instance, and it has been brought up before this committee before, but, the *Seeger* case is the one that has given a lot of people concern in this Congress, I'm sure, because I know something about it. They put the Supreme Being in to make it more tough. And they ended up with the Supreme Court saying that the Congress obviously was trying to broaden it.

Mr. King: We ought to put the Supreme Being in the Supreme Court.

General Hershey: Probably still 4 to 5 though, I wouldn't be surprised. [A lot of laughter.]

[*Mr. King:*] I think we are getting into a question whether you would be content with it, without the actual purpose.

[*General Hershey:*] Anyway, I have felt that maybe if the Congress removed the Supreme Being, it would be evidence that they didn't put it in, to broaden it; but on the other hand I wouldn't want to bet it wouldn't be taken as more evidence of broadmindedness [B]ut I'm somewhat in a quandary about what to do, because when you don't know what is going to be interpreted in your law, how do you know what to legislate?¹⁴¹

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2553.

¹⁴¹ *Id.* at 2635-2636.

This discussion of the definitional problems posed by *Seeger*, which continued for almost four pages, concluded with LTG Hershey agreeing with Chairman Rivers that returning to the language of the 1940 Act might clarify Congress's intent to "go back to the oldtime religion."¹⁴²

The committee reported out a bill on May 18, 1967. Consistent with the recommendations of General Clark and LTG Hershey, the bill retained the requirement that conscientious objections be based on "religious training and belief," but deleted the statutory definition of that phrase added by the 1948 Act. The committee report explaining these changes discussed the effect of *Seeger* as "significantly broadening ... the basis on which claims for conscientious objection can be made."¹⁴³ The report cited LTG Hershey's conclusions that "this undue expansion ... could very easily result in a substantial increase in the number of unjustified appeals for exemption from military service based upon this provision of law."¹⁴⁴ The committee explained its decision to retain the "religious training and belief" requirement as restating "the original intent of the Congress in drafting this provision of the law."¹⁴⁵

The House-Senate conference restored some limiting language to define "religious training and belief." The conference report on the bill explained the reasons for these changes as follows:

The Senate conferees also concurred in the desire of the House language to more narrowly construe the basis for classifying registrants as "conscientious objectors." The recommended House language required that the claim for conscientious objection be based upon "religious training and belief" as had been the original intent of Congress in drafting this provision of the law.

The Senate conferees were of the opinion that congressional intent in this area would be clarified by the inclusion of language indicating that the term "religious training and belief" as used in this section of the law does not include "essentially political, sociological, or philosophical views or a merely personal moral code."¹⁴⁶

¹⁴²*Id.* at 2652.

¹⁴³H.R. REP. NO. 267, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A. M308, 1334.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶H.R. CONF. REP. NO. 346, 90th Cong., 1st Sess. 9 (1967), reprinted in 1967 U.S.C.C.A. M352, 1360.

This clearly expressed intent to limit the scope of the conscientious objector exemption resulted in the current statutory limitation on the term "religious training and belief." The current statutory provision reads as follows: "As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code."¹⁴⁷

Had Justice Black been interested in discerning congressional intent in his effort to interpret the statutory language, a substantial and detailed record of that intent was available to him. Unfortunately, the record of Congress's intent was contrary to his own absolutist position on the permissible interface between government and religion. Even though *Welsh* was not a constitutional case, Justice Black applied his understanding of First Amendment principles to reach the result he wanted.

One commentator summarized Justice Black's jurisprudence in the area of church-state relations by writing, "He simply did not want the government trying to determine what religion is and what it is not"¹⁴⁸ He favored the Madisonian view, which treated religion as being synonymous with conscience, even though Madison's proposals for the First Amendment that equated the two concepts were rejected.¹⁴⁹ As a result of his belief in First Amendment absolutes, Justice Black hardly hesitated to substitute his own deeply held beliefs on the relationship between government and religion for Congress's intent in the conscientious objector exemption. As one commentator observed, "The fact that he had to resort to tactics involving less than the highest traditions of legal scholarship and judicial consistency in order to obtain his constitutional objective did not deter him in the slightest."¹⁵⁰

Justice Black, however, was not free to substitute his judgement for that of Congress unless the statutory scheme was

¹⁴⁷50 U.S.C. app. § 456(j) (1988).

¹⁴⁸Paris, supra note 122, at 479-80; see also Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) (discussing Justice Black's view that the Bill of Rights contains "absolutes," particularly in the area of the First Amendment, which may not be balanced off against public interest or governmental need); Edmund Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553, 563 (1962). The "article" is actually a transcript of Professor Cahn's interview of Justice Black at the 1962 convention of the American Jewish Congress in which Justice Black further explains his First Amendment jurisprudence. Among Justice Black's comments: "Nevertheless, I want to be able to do it (practice religion) when I want to do it. I do not want anybody who is my servant, who is my agent elected by me and others like me, to tell me that I can or cannot do it." "I am for the First Amendment from the first word to the last. I believe it means what it says, and it says to me, 'Government shall keep its hands off religion'."

¹⁴⁹Paris, supra note 122, at 481.

¹⁵⁰*Id.* at 484.

unconstitutional, and neither *Seeger* nor *Welsh* were decided on constitutional grounds. The Court describes its task in a statutory interpretation case much as Justice Harlan described it in his concurrence in *Welsh*. The Court has noted, "Our task is to give effect to the will of Congress, and where that will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."¹⁵¹ Justice Black paid scant attention to the will of Congress, preferring instead to rely on his own understanding of religion.

The concept of "religious training and belief" is not foreign to the American experience. The common-sense understanding of the term indicates that religion means more than a personal moral code or a standard of ethical conduct. By drawing on this understanding and linking the statutory term with the specific language Congress included in the statute to advise what was not included in the term, one can find a comprehensible standard.¹⁵² This definitional chore is even clearer given the record of congressional disapproval of the *Seeger* standard.

On the other hand, because both *Seeger* and *Welsh* involved interpretations of the 1948 Act, the Supreme Court was not necessarily required to interpret the amended language of the 1967 Act to resolve either case. The Court has never confronted the evidence of congressional intent to overrule *Seeger* legislatively.¹⁵³ Absent a constitutional infirmity, Congress's 1967 formula ought to control who qualifies for exemption under the Selective Service Act's conscientious objector provision. To the extent that the in-service conscientious objector program emulates the Selective Service Act's policies regarding conscientious objection, the in-service program likewise ought to adopt a more limited definition of "religious training and belief."

2. *Consequences of an Overinclusive Standard.*—The overinclusive standard for "religious training and belief" developed in *Seeger* and *Welsh* resulted in four sets of adverse consequences. First, the *Seeger-Welsh* standard gives the irrational result that a standard which requires religious beliefs may not distinguish between secular and religious beliefs. Second, the *Seeger-Welsh* standard in several ways fosters unfairness or the perception of injustice in the administration of the in-service conscientious objector program. Third, following the *Seeger-Welsh* standard in a time of rapid changes in the military's mission and size threatens military readiness. Finally, what amounts to a standardless

¹⁵¹*Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

¹⁵²*See infra* Part V.A.3.

¹⁵³*See* Sullivan, *supra* note 85, at 757.

standard poses several practical difficulties to the military as it administers the in-service conscientious objector program.

(a) The Irrational Outcome Consequence.—The Court in Seeger and Welsh took a statutory standard that required religious belief and converted it to a standard that forbids the government from distinguishing between religious and secular beliefs in the area of ethics, philosophy, and personal moral codes. One commentator concluded, “Now the conscientious objector exemption might be forbidden only to the lukewarm and opportune. All others, regardless of their beliefs, were lumped into the protected category ‘religious’.”¹⁵⁴ The opinions accomplish this transformation not only by interpreting “religion” in the broadest possible terms, but also by rendering meaningless the limiting language Congress included in the statute. This language would have excluded beliefs that were not linked by reference to a Supreme Being, as well as beliefs that were “essentially political, sociological or philosophical” or that constituted a “personal moral code.”¹⁵⁵ The Seeger-Welsh standard, however, would define these beliefs as “religion” as long as the claimant held them deeply and sincerely.

The Court itself implicitly recognized the counter-intuitive outcome of its newly declared standard. Justice Black stated that a claimant’s own characterization of his beliefs as “nonreligious” was a “highly unreliable guide” to the factfinder.¹⁵⁶ Under normal circumstances, one would consider the claimant to be the most competent to identify his belief system as religious or not. These are, however, far from normal circumstances. Justice Black apparently concluded that the world of conscientious objection lies far beyond the ken of the ordinary claimant of conscientious objector status. He noted, “Very few registrants are fully aware of the broad scope of the word “religious” as used in 6(j) . . .”¹⁵⁷ As long as the in-service conscientious objector program follows the Seeger-Welsh standard, the program indeed exists in “an Alice-in-Wonderland world where words have no meaning.”¹⁵⁸

(b) The Unfairness and Injustice Consequence.—The overinclusive standard from Seeger and Welsh also fosters a perception of unfairness or injustice in the in-service conscientious objector program. The overinclusive standard is contrary to the national consensus on the issue of who ought to be excused from military service. Each time Congress considered the issue of

¹⁵⁴ Paris, *supra* note 122, at 458.

¹⁵⁵ Selective Service Act of 1948, Pub. L. No. 80-759, § 6(j), 62 Stat. 604, 612-13 (1948) (codified as amended at 50 U.S.C. app. at 456(j) (1988)).

¹⁵⁶ Welsh v. United States, 398 U.S. 333, 341 (1970).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 354 (Harlan, J., concurring).

the conscientious objection exemption, it heard testimony and earnest recommendations to expand the conscientious objection exemption beyond objections based on religious belief.¹⁵⁹ On each occasion, Congress refused to follow that course and opted to retain the religious requirement.

This repeated affirmation of the greater protection afforded religious-based conscientious objections reflects a profound national commitment to protecting religious values. This is the same commitment demonstrated throughout the nation's history.¹⁶⁰ The nation does not wish to equate religious belief with sociology, philosophy or ethics. Nevertheless, as one commentator pointed out, the *Seeger-Welsh* standard, "unrealistically labels as 'religion' beliefs and activities that do not serve the function of religion in society."¹⁶¹ Congress never intended this result and, as legislative history demonstrates, it actually worked hard to avoid it.

The Court's insistence on substituting its concepts of religion and religious beliefs for those specified by Congress risk violating the implicit social contract represented by the conscientious objector exemption.¹⁶² The exemption evidences the nation's willingness to accept the injustice of excusing some from a military obligation to protect a respected national value—in this case, religious belief—when others who may have other good reasons for avoiding continued service are not exempted from their obligations. The class eligible to receive the exemption should be defined clearly and in a manner perceived to be just so that those administering the program can determine accurately who falls within the program's benefits. To the extent that the *Seeger-Welsh* standard exceeds this national consensus, the new

¹⁵⁹SELECTIVE SERVICE MONOGRAPH, *supra* note 7, at 55 (Congress's refusal to extend the conscientious objector exemption in the 1917 Act beyond objections based upon religious belief); *id.* at 70, 73-4 (Congress's refusal to adopt recommendations of the American Civil Liberties Union and Religious Society of Friends to extend conscientious objector status under the 1940 Act to all conscientious objectors regardless of whether their objections were religious based); H.R. Doc. No. 12, *supra* note 132, at 2151, 2306, 2315, 2378-87, 2413, 2431 (1967) (Congress was unpersuaded by testimony of the Voters for Peace Executive Committee, ACLU, United Presbyterian Church, United Church of Christ, American Ethical Union and the Church of the Brethren in favor of expanding the exemption in the 1967 Act beyond religious-based beliefs).

¹⁶⁰See *supra* Part II; see also 10 U.S.C. § 312(b) (1988) ("A person who claims exemption because of religious belief is exempt from militia duty in a combatant capacity; if the conscientious holding of that belief is established under such regulations as the President may prescribe. However, such a person is not exempt from militia duty the President determines to be noncombatant").

¹⁶¹Steven D. Collier, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L. J. 973, 989 (1982).

¹⁶²Sweeney, *supra* note 123, at 72 ("Strong feeling exists in and out of Congress, however, that the Conscientious Objector exemption was abused with the support of the Supreme Court during the Vietnam war").

standard promotes unfairness or injustice by benefiting those whom the nation never intended to benefit and for reasons the nation has demonstrated repeatedly it is unwilling to support.

The *Seeger-Welsh* standard also fosters unfairness or injustice by favoring claimants who are educated, articulate, able to retain counsel for representation, or able to obtain conscientious objection counseling. The well-counseled claimant will know to avoid the legal “mine fields” posed by beliefs held prior to entering the military or beliefs relating to selective conscientious objection, regardless of whether he or she actually holds such beliefs. The educated or articulate claimant will have the advantage of being able to explain his or her beliefs more clearly than most other claimants. The well-counseled claimant will be better able to demonstrate how his or her beliefs meet the abstract requirements of the *Seeger-Welsh* standard. Such counseling is far more important in these cases than in other legal proceedings because a claimant necessarily will be tested on what his or her core beliefs and life values are—powerful and emotionally laden topics, even under the best of circumstances.

As one commentator concluded on this fairness issue, “sophistication and ability to hire counsel put one at a great advantage in formulating a sustainable conscientious objector claim and in having it ultimately **sustained**.”¹⁶³ The *Seeger-Welsh* standard favors the educated and well-counseled and, as a result, places the undereducated or inarticulate at a disadvantage and may not evaluate the individual claimant and the nature of his or her beliefs fairly.¹⁶⁴

The overinclusiveness of the *Seeger-Welsh* standard creates a final fairness or injustice issue in its failure to recognize the fundamentally different nature of today’s all-volunteer force. The current Department of Defense directive was born during an era when the United States maintained an active Selective Service and conscripted a significant proportion of its active-duty armed forces.¹⁶⁵ Compelled military service is a far different matter than military service assumed voluntarily. The volunteer affirmatively declares that he or she is not a conscientious objector to military

¹⁶³Martha A. Field, *Problems of Proof in Conscientious Objector Cases*, 120 U. PA. L. REV. 870, 935-36 (1972).

¹⁶⁴For a more detailed exploration of this argument in the context of the Vietnam war era draft, see Robert M. Brandon, Note, *The Conscientious Objection Exemption: Discrimination Against the Disadvantaged*, 40 GEO. WASH. L. REV. 274 (1971).

¹⁶⁵The Department of Defense first promulgated Directive No. 1300.6 on Aug. 21, 1962. It has amended the Directive twice—once in 1968 and again in 1971. 32 C.F.R. § 75 (1992); DEP’T OF DEFENSE, DIRECTIVE No. 1300.6, CONSCIENTIOUS OBJECTION, (Aug. 20, 1971).

service both by the act of stepping forward to join the military and by the affirmation during the enlistment process.¹⁶⁶ The volunteer is able to consider thoroughly the implications of military service prior to signing the enlistment contract and taking the oath of enlistment or accepting a commission.

These conditions stand in sharp contrast to the inductee swept into the military from civilian life without a choice in the matter and without the benefit of time to consider all the implications of military service. Compelled military service is the most demanding obligation a nation may impose on its citizens and should not be imposed lightly on those who find deep moral offense to such service. A conscientious objector policy that distinguishes between the volunteer and the unsuspecting conscript in their respective claims for exemption from military service clearly has some justifications. Courts and commentators have recognized these differences as significant in considering the proper response to a claim of conscientious objection.¹⁶⁷ The current in-service program, however, simply imports the standards applicable to the draft law conscientious objector exemption without considering the very different circumstances confronting the volunteer and the conscript.

(c) *The Potential Readiness Consequence.*—The Seeger-Welsh standard for “religious training and belief” grew out of a time when the military not only relied upon the draft for much of its manpower needs, but also grew to meet the national security missions of the time. The advent of a volunteer force and the restructuring of the United States armed forces and national security strategy following the end of the Cold War require a reassessment of the Seeger-Welsh standard not only for the fairness issue discussed above, but also for the potential military readiness impacts of an overbroad standard.

The impact of personnel losses because of an in-service conscientious objector program is significantly different than the impact of losses because of a conscientious objector exemption

¹⁶⁶See Dep’t of Army, DA Form 3286, Statements for Enlistment (1 Sept 1979) (“I am not consciously [sic] opposed by reason of religious training and belief, to bearing arms or to participation, or training for war in any form.”); Dep’t of Defense Form 1966, Record of Military Processing, Armed Forces of the United States 2 (1989).

¹⁶⁷See *Brown v. McNamara*, 387 F.2d 150, 152 (3d Cir. 1967) (“It is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntary enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life”); *In re Kanewske*, 260 F.Supp. 521, 524 (N.D. Cal. 1966) (drawing a distinction between the voluntary enlistee and the drafted service member); Sullivan, *supra* note 85, at 753 (pointing out that courts have found the obligation imposed by involuntary military service to be a significant distinction for free exercise purposes).

only from conscripted military service. In the latter case, the government has invested neither the time nor money in training the soldier, nor has the military integrated the soldier into the force as a member of the military team.

The cost to the government is greater when a trained member of the force leaves the military than when an untrained conscript receives an exemption from compulsory service. Commentators have noted this difference and have speculated that it may be a difference of constitutional significance, justifying disparate treatment for in-service objectors.¹⁶⁸ In other words, this difference could justify a more generous conscientious objector exemption for Selective Service purposes than for the in-service objector. Nevertheless, the military has not recognized this distinction in the potential readiness impacts of the in-service objector versus the conscripted objector. Furthermore, the in-service conscientious objector program continues to be based on the 1960s' draft law model.

The Department of Defense policy on the in-service conscientious objector potentially affects three central components of the re-defined United States national security strategy. Current national security strategy emphasizes forward presence of military forces, crisis response capability, and a smaller force structure.¹⁶⁹

The forward presence component of this strategy provides an initial crisis response capability and a logistics base for bringing follow-on forces when necessary. It also demonstrates American resolve to deter conflict and promote regional stability.¹⁷⁰ The crisis response component of this strategy requires forces that can respond decisively to short notice crises.¹⁷¹ Finally, the new

¹⁶⁸See Montgomery, *supra* note 31, at 399 ("The state might well be deemed to have a more compelling interest in obtaining efficient and uninterrupted service from men already in uniform than it does in drafting each and every individual in the original manpower pool"); Thomas R. Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 MIL. L. REV. 53, 71 (1982) (discussing how *Rostker v. Goldberg* found administrative efficiency sufficient justification for gender-based discrimination; "It would seem to follow that administrative necessity is a much weightier concern when it involves the potential availability of soldiers who have already been trained); *cf.* Greenawalt, *supra* note 73, at 50 ("There is, however, a special "manpower" problem with respect to "in-service" objectors since military operations may suffer if key personnel opt out with any frequency").

¹⁶⁹THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 27-31 (1991).

¹⁷⁰SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND TO THE CONGRESS 7-8 (1992).

¹⁷¹Former Secretary of Defense Cheney emphasized this requirement by stating, "Because of the high level of uncertainty in the international environment ... readiness and mobility must be among the highest priorities, especially for forces designated to respond to short notice crises." *Id.* at 8-9.

national security strategy calls for a smaller force structure that relies primarily on active component forces for initial crisis response and reserve forces for essential support units and augmentation capability.¹⁷²

Conscientious objector policy potentially affects each of these three components of the new national security strategy. More than ever, the national security strategy relies on high levels of military readiness and the capability of projecting and sustaining forces overseas on little or no notice. At the same time, this short-notice crisis response capability must be available with a smaller force structure. A broadly defined conscientious objector policy could conflict with these fundamental components of the new national security strategy, potentially jeopardizing the armed forces' crisis response capability.

Although the military currently does not consider the conscientious objector program a readiness issue,¹⁷³ the ongoing changes in the military, combined with the overbroad standard, have the potential to create readiness problems. As the military shrinks and relies more heavily on rapid deployment and crisis response capabilities in its remaining forces, it becomes more vulnerable to personnel policies that could remove key members of the very team that gives the military its rapid response capability. The Department of Defense should revise its policy toward conscientious objectors to contribute to the military's ability to meet its crisis response mission while accommodating sincere religious-based objections.

(d) *The Practical Difficulties Consequence.*—The last set of problems created by the overbroad Seeger-Welsh standard are the practical difficulties that accompany the obligation to administer a program without a comprehensible standard. These difficulties include the problem of applying an overbroad and abstract standard to individual cases and the great potential for fraudulent claims arising from having such a standard.

An investigating officer will find difficulty in seriously challenging a claimant's declaration that his or her beliefs fall within the Seeger-Welsh standard of "religious training and belief." Commentators have discussed the inherent difficulty of achieving uniform results when applying the Seeger-Welsh standard.¹⁷⁴ One

¹⁷²*Id.* at 10.

¹⁷³Tugwell interview, *supra* note 83; GAO Interview, *supra* note 64.

¹⁷⁴Field, *supra* note 163, at 889; Robert L. Rabin, *A Strange Brand of Selectivity: Administrative Law Perspectives on the Processing of Registrants in the Selective Service System*, 17 *U.C.L.A. L. REV.* 1005, 1019 (1970); Sweeney, *supra* note 123, at 77 ("One can also see that determining who qualifies for an

of these commentators actually concluded that “present criteria for conscientious objector status—whether a registrant’s belief is sincerely held and ‘occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption’—are too elusive to admit of reliable application.”¹⁷⁵

The experiences of current investigating officers bear out the criticism—the standard is confusing.¹⁷⁶ The standard requires evaluation of the depth and sincerity of a claimant’s belief as the only remaining substantive requirement. The Supreme Court recognized the difficulty of devising procedures to ensure justice in such inquiries even before it greatly expanded the universe of beliefs that could qualify as “religious.”¹⁷⁷ The overbroad standard results in confusion and in a lack of uniformity—both of which well may contribute to unfairness and injustice.

The *Seeger-Welsh* standard also invites fraudulent claims. For years commentators have pointed out that the abstract standard devised by the Court in *Seeger* and *Welsh*, combined with the often unpleasant circumstances of military service, amounts to an invitation to fraud.¹⁷⁸

The generous standard simplifies the task of an articulate or well-counselled claimant of presenting a prima facie case for conscientious objector status.¹⁷⁹ The nature of military service itself provides ample incentive—for those who choose to seek such an escape—to fabricate a prima facie case for conscientious objector status. Military service often includes austere living conditions, difficult or unpleasant duties, and constant reminders of the disciplinary authority to which all soldiers are subject at all

exemption becomes more difficult as the test of religion becomes psychological rather than institutional How do we measure the firmness of one’s conviction in a personal and perhaps unique faith?”).

¹⁷⁵Field, *supra* note 163, at 929.

¹⁷⁶Freeman interview, *supra* note 86; Darpino interview, *supra* note 78; Moore interview, *supra* note 86.

“United States v. Nugent, 346 U.S. 1, 19 (1953) (“It is always difficult to devise procedures that will be adequate to do justice in cases where the sincerity of another’s religious convictions is the ultimate factual issue. It is especially difficult when these procedures must be geared to meet the imperative needs of mobilization and national vigilance”).

¹⁷⁸See Field, *supra* note 163, at 936 (“The inherent difficulties of determining who is a conscientious objector make that classification much more susceptible to false claims”); Donald N. Zillman, *Conscientious Objection and the Military*: Gillette v. U.S., *Negre v. Larson*, Ehlert v. U.S., 53 MIL. L. REV. 185, 193 (1971) (pointing out judges’ comments on the ease with which one can make out a prima facie case of conscientious objection); Greenawalt, *supra* note 73, at 89 (commenting on how the often austere and difficult life in the military provides strong motive to fabricate).

¹⁷⁹Paszel v. Laird, 426 F.2d 1169, 1174 (2d Cir. 1970).

times. The prospect of a deployment into combat creates an extreme incentive to falsify.

Once the claimant presents a prima facie case, the investigating officer confronts the difficult mission of inquiring into the claimant's sincerity based almost exclusively on information the claimant provides.¹⁸⁰ The troubling result of this chain of events and circumstances is that, in the words of one commentator, "[One's] chances of success . . . will depend less on whether he [or she] is a sincere conscientious objector than on the care he [or she] takes in supplying data to [the factfinder]."¹⁸¹

The overinclusive *Seeger-Welsh* standard leads to irrational results; creates a range of actual and potential unfairness and injustice; creates potential readiness problems; and poses unnecessary practical difficulties. The in-service conscientious objector program ought to reflect society's judgment concerning what constitutes religion and who ought to serve when not all serve.¹⁸² The in-service conscientious objector program also ought to reflect the needs of the military today, rather than the past concerns of a conscripted military and a nation torn by an unpopular war.

Commentators have concluded that the strong opposition to the war in Vietnam and the charges of serious inequities in the administration of the Selective Service during the Vietnam War led to judicial activism as a means of correcting injustices that the executive and legislative branches seemed unwilling or unable to redress.¹⁸³ A standard of "religious training and belief" shaped by a perceived need for judicial intervention in another era, and designed to confront perceived injustice in another time, continues to direct the current in-service conscientious objector program.

The needs of the nation and the current, all-volunteer armed forces are not the same as those of the nation and its armed

¹⁸⁰ Darpino interview, *supra* note 78; Freeman interview, *supra* note 86; Field, *supra* note 163, at 898.

¹⁸¹ Field, *supra* note 163, at 898.

¹⁸² MARSHALL REPORT, *supra* note 129 (paraphrasing the title of the Marshall Commission's report).

¹⁸³ Asimow, *supra* note 106, at 898 (citing a string of Supreme Court defeats for the Selective Service to support his conclusion, "One point seems clear. These cases unmistakably evidence the hostility of the majority of the Supreme Court toward the Selective Service"); *Oestereich v. Selective Serv. Bd.* No. 11, 393 U.S. 233 (1968) (overturning Selective Service policy on preinduction judicial review); *McKart v. United States*, 395 U.S. 185 (1969) (overruling Selective Service policy on exhaustion of administrative remedies); *Breen v. Selective Serv.*, 396 U.S. 460 (1970) (critical of Selective Service policy regarding preinduction judicial review); *Gutknecht v. United States*, 396 U.S. 295 (1970) (overturning Selective Service policy regarding delinquency inductions). *Seeger* and *Welsh* should be added to this list as additional examples of how the Supreme Court appeared to go out of its way to reinvent the Selective Service; see also Hansen, *supra* note 85, at 981.

forces of twenty-five years ago. The nation and its armed forces are not well served by a conscientious objector policy designed during an era of vastly different military personnel concerns and personnel procurement policies. For all these reasons, the in-service program ought not be bound by the Seeger-Welsh standard and the many problems which that standard creates.

3. Curing the Overinclusive Standard: What Standard Should the Military Apply?—The plain language of the statutory conscientious objector exemption, as well as the legislative histories of the current statutory provision and the 1948 provision demonstrate that the Seeger-Welsh standard is not what Congress intended.¹⁸⁴ Several sources indicate how the military might redefine the standard for “religious training and belief.” Congress has provided guidance in the specific exclusionary language in the statutory conscientious objector exemption. The Supreme Court has discussed the constitutional dimensions of “religion.” Finally, several commentators have wrestled with the problem of defining religion and have proposed conceptual frameworks—if not actual definitions—to apply in religion cases.

Congress specifically excluded certain types of beliefs from the coverage of the statutory conscientious objector exemption. Beliefs based on “essentially political, sociological, or philosophical views, or a merely personal moral code,” do not qualify for the exemption.¹⁸⁵ Congress intended to distinguish secular beliefs—even those that are deeply held and or those that guide one’s life—from religious beliefs. Accordingly, even a deeply held and life-guiding belief in a personal moral code or a life-guiding philosophy lack something that Congress would require to qualify for the exemption.

On at least two occasions since 1960, the Supreme Court has contributed some guidance on the constitutional dimensions of religion. In *Torcaso v. Watkins*,¹⁸⁶ the Court held that the government may not distinguish between “those religions based on the belief in the existence of God as against those religions founded on different beliefs.”¹⁸⁷ Justice Black authored the opinion of the Court and, for the first time, demonstrated the breadth of his concept of religion. In a footnote to the opinion, he included Ethical Culture and Secular Humanism among “religions” that did not teach theistic beliefs, but which he believed

¹⁸⁴ See *supra* Part V.A.1.

¹⁸⁵ 50 U.S.C. app. § 456(j) (1988).

¹⁸⁶ 367 U.S. 488 (1961) (overturning a state constitutional provision that required state officials to express their beliefs in God as a prerequisite to taking public office).

¹⁸⁷ *Id.* at 495.

were deserving of First Amendment protection.¹⁸⁸ Although Justice Black believed that some apparently secular belief systems deserved First Amendment protection, his footnote in *Torcaso* emphasized belief systems with recognizable communities of believers.¹⁸⁹

In *Wisconsin v. Yoder*,¹⁹⁰ the Supreme Court again addressed the constitutional dimensions of religion, albeit in dicta. The Court stated that a free exercise claim "must be rooted in religious belief."¹⁹¹ The Court then distinguished religious belief from "philosophical and personal" views and from beliefs that constitute a "rejection of the contemporary secular values accepted by the majority."¹⁹² The Court stated that no person is entitled to exemption from reasonable state regulations for "purely secular considerations."¹⁹³

By citing Thoreau as a paradigm of the secular believer not coming within the purview of religion, the Court apparently rejected, for constitutional purposes, the functional analysis it used to create the *Seeger-Welsh* standard.¹⁹⁴ Certainly Thoreau's beliefs guided his life and occupied a place in his life parallel to that of orthodox religion, but this was not enough to constitute religion for constitutional purposes. The Court also impliedly rejected Justice Black's assertion in *Torcaso* that secular belief systems qualified as religions. The secular belief systems Black cited in *Torcaso* probably would not qualify as religions under *Yoder's* criteria.

Many legal commentators have proposed formulae for measuring whether a given belief system constitutes a religion.¹⁹⁵

¹⁸⁸*Id.* at 495 n.11 (listing Buddhism, Taoism, Ethical Culture, and Secular Humanism as nontheistic belief systems deserving First Amendment protection as "religions").

¹⁸⁹Anand Agneshwar, Note, Rediscovering God in the Constitution, 67 *N.Y.U. L. REV.* 295, 301 (1992).

¹⁹⁰406 U.S. 205 (1972) (upholding an Amish claim of exemption from state compulsory education requirements).

¹⁹¹*Id.* at 215.

¹⁹²*Id.* at 216.

¹⁹³*Id.* at 215.

¹⁹⁴Freeman, *supra* note 103, at 1527; Agneshwar, *supra* note 189, at 304; *Yoder*, 406 U.S. at 247-48 (Douglas, J., dissenting in part).

¹⁹⁵*See, e.g.*, Agneshwar, *supra* note 189 (postulating a definition that focuses on belief in supernatural intervention in or explanation of life); Collier, *supra* note 161 (advocating a four-factor definition of religion); Freeman, *supra* note 103 (denying that one adequately can define religion, but presenting instead a multi-factor paradigm); John Mansfield, Conscientious Objection-1964 Term, in *RELIGION AND THE PUBLIC ORDER* 3 (D. Giannella ed. 1965) (arguing that any definition must look to the fundamental character of the truths asserted by the belief system to determine whether it is a religion); and Gail Merel, *The*

Among the more intuitively satisfying and practical are the three approaches that follow.

Anand Agneshwar has proposed a definition for religion that emphasizes the supernatural component of religious belief as a way of distinguishing between secular and religious belief systems.¹⁹⁶ He has pointed out that American society continues to differentiate between moral views that flow from a belief in the supernatural or in a transcendent reality from other moral views.¹⁹⁷ In his view, defining religion by reference to a transcendent reality and supernatural explanation of life restores the intuitively necessary spiritual component to religion.¹⁹⁸ At the same time, this tighter definition avoids the slippery slope of free exercise claims based only on depth of individual belief without reference to what is recognizably religious.¹⁹⁹

Steven Collier has proposed a more organizationally based test for religion, founded on four elements. He has argued that courts evaluating free exercise claims for exemption must determine whether the claimant belongs to an organization; whether that organization imposes moral demands on its members; whether these demands are based on insights into the meaning of existence; and whether membership involves engaging in conduct or practices based on beliefs.²⁰⁰

Collier has argued that the organizational requirement reflects the reality that religion is practiced by communities of believers and that the requirement contributes an objective measure for religious belief.²⁰¹ The requirement for moral demands based on an understanding of the meaning of existence fulfills two of the principle functions of religion in society—providing a system of morality and an explanation of the meaning of life.²⁰² This requirement also distinguishes religion from other belief systems that encourage or mandate morality. The final requirement that religion include conduct or practices reflects the

Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment, 45 U. CHI. L. REV. 805 (1978) (advocating a constitutional approach that distinguishes between beliefs as labeled by the adherent: any multidimensional system of beliefs sincerely asserted as religiously held).

¹⁹⁶ Agneshwar, *supra* note 189, at 297 (“Religion is a system of beliefs, based upon supernatural assumptions, that posits the existence of apparent evil, suffering or ignorance in the world and announces a means of salvation or redemption from those conditions”).

¹⁹⁷ *Id.* at 332.

¹⁹⁸ *Id.* at 333.

¹⁹⁹ *Id.* at 324.

²⁰⁰ Collier, *supra* note 161, at 998-99.

²⁰¹ *Id.* at 995.

²⁰² *Id.* at 988.

function religion plays in adherents lives²⁰³ and provides another objective measure for the factfinder.²⁰⁴

Collier has summarized his approach by stating, “Anything that does not serve the functions religion normally serves in society should not receive the protections of the religion clauses.”²⁰⁵

George Freeman has rejected efforts to define religion, and has argued instead that the most one can do is identify significant indicia of religion and then measure a given claim against this paradigm to determine the relative strength of the claim. His paradigm consists of the following eight relevant features:

- (1) A belief in a Supreme Being;
- (2) A belief in a transcendent reality;
- (3) A moral code;
- (4) A world view that provides an account of humanity’s role in the universe and which organizes the believer’s life;
- (5) Sacred rituals and holy days;
- (6) Worship and prayer;
- (7) A sacred text or scriptures; and
- (8) Membership in a social organization that promotes a religious belief system.²⁰⁶

Freeman refuses to say which combinations are sufficient to constitute religion, leaving to the factfinder the role of measuring a given claim against the factors in the paradigm.

Each of the three paradigms or definitions share certain characteristics, which demonstrates that religion possesses an identifiable degree of consistency. Each acknowledges the significance of a supernatural or transcendent reality, which distinguishes religion from secular belief systems. Each acknowledges the significance of a cosmology or explanation for the meaning of existence, which also distinguishes religion from secular belief systems. Finally, each acknowledges the significance of a moral code linked to a cosmology and transcendent reality.

Freeman’s paradigm and Collier’s four-functional-element test each recognize the significance of an organized community of

²⁰³*Id.* at 1000.

²⁰⁴*Id.* at 996.

²⁰⁵*Id.* at 1000.

²⁰⁶Freeman, *supra* note 103, at 1553.

adherents. Freeman and Collier also recognize the significance of behavior or activities shaped by the organization's moral code and understanding of the meaning of existence.

The guidance from Congress and the Supreme Court, along with the three proposals discussed above, facilitate a workable approach to defining religion in the context of conscientious objection. Congress evidenced a clear intent to distinguish secular belief systems from religion.²⁰⁷ The Supreme Court has stated that the government should not distinguish between theistic and nontheistic religions.²⁰⁸ The Court also has impliedly endorsed the idea of a community of adherents as a requirement for religion²⁰⁹ and has clearly stated that purely secular beliefs, such as personal beliefs and philosophy, fall outside the protections of the First Amendment religion clauses.²¹⁰

Drawing upon all of this guidance, the Department of Defense should adopt the following definition for "religious training and belief" in the in-service conscientious objector program:

Beliefs arising from recognition of a supernatural component to life. This supernatural component may be represented by belief in God, belief in an afterlife, or belief in the ability to reach a higher existence beyond the world as we understand it. These beliefs must provide an explanation for existence; must impose moral obligations; must encourage or demand specific behaviors or practices; and must be shared by a community of believers.

This definition incorporates factors such as supernatural belief and an explanation for existence, both of which distinguish religious belief from secular belief systems. This proposal also provides objective criteria that not only are more readily identifiable to a factfinder, but also indicate to society that the believer is engaging in the practice of religion. The adverse consequences discussed above demonstrate that the in-service conscientious objector program ought not recognize as "religion" that which society cannot recognize as "religion." This definition corrects the overbroad reach of the *Seeger-Welsh* standard and, by doing so, redresses the many adverse consequences accompanying that standard.²¹¹

²⁰⁷ See *supra* Part V.

²⁰⁸ See *supra* notes 176-77 and accompanying text.

²⁰⁹ See *supra* text accompanying note 178.

²¹⁰ See *supra* notes 181-83 and accompanying text.

²¹¹ See *supra* Part VA.2.

4. *Will the New Standard Pass Constitutional Muster?*—

Although both *Seeger* and *Welsh* were decided as cases of statutory interpretation, concurring opinions in both cases and many commentators have ascribed constitutional significance to the definition of religion the Court attached to the statutory phrase “religious training and belief.”²¹² If this is true, then restricting the definition of “religious training and belief” as proposed would run afoul of constitutionally protected interests.

Even before reaching the constitutional questions, one must deal with the question of whether the military has the regulatory authority to redirect its in-service conscientious objector program away from the Selective Service model as interpreted by the Supreme Court. If the two programs are linked statutorily, then the military must either accept the status quo or seek congressional action to change the current in-service program.

Congress has given the military independent authority to govern its internal personnel matters.²¹³ This authority permits the military to establish its own system of internal governance as long as it is not inconsistent with applicable constitutional and statutory obligations. Therefore, the Department of Defense has the independent authority to amend, or even abolish, its in-service conscientious objector program as long as it does not run afoul of constitutional obligations or Congress’s lawmaking.

The constitutional arguments surrounding the issue of conscientious objection follow two separate lines of analysis, relying on the two different guarantees of religious freedom found in the First Amendment.²¹⁴ One theory argues for a constitutional right to conscientious objection based on the Free Exercise Clause of the First Amendment.²¹⁵ In the context of the proposed definition of “religious training and belief,” this theory argues

²¹²*United States v. Seeger*, 380 U.S. at 188 (Douglas, J., concurring); *Welsh v. United States*, 398 U.S. at 357-58 (Harlan, J. concurring); see Greenawalt, *supra* note 73, at 39; Paris, *supra* note 122, at 455-56; Collier, *supra* note 161, at 982; Freeman, *supra* note 103, at 1526, n.45; Agneshwar, *supra* note 189, at 300-303.

²¹³See 10 U.S.C. § 113(b) (1988) (granting the Secretary of Defense “authority, direction, and control over the Dep’t of Defense”); *id.* § 121 (“The President may prescribe regulations to carry out his functions, powers, and duties under this title”); *id.* § 125 (“The Secretary shall take appropriate action (including the transfer, reassignment, consolidation, or abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation and to eliminate duplication in the Dep’t of Defense”); *id.* § 3061 (“The President may prescribe regulations for the government of the Army”); *id.* § 8061 (“The President may prescribe regulations for the government of the Air Force”).

²¹⁴“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

²¹⁵See Sturm, *supra* note 80, at 265.

that the more restrictive definition violates the Free Exercise Clause. The second theory states that the Establishment Clause of the First Amendment forbids the government from discriminating between “religious” and “nonreligious” conscientious objectors or from creating a system to accomplish that end.²¹⁶ Both theories founder on the shoals of the Supreme Court’s constitutional jurisprudence in the area of the First Amendment’s religion guarantees.

(a) Free Exercise Challenge. —The first theory of constitutional involvement in the conscientious objector process, that the Free Exercise Clause obliges the government to recognize a right to conscientious objection, is no stranger to the courts or commentators and uniformly has failed to carry the day. While the Supreme Court has never ruled squarely on this proposition, a consistent string of comments in dicta, supported by the Court’s holdings in conscientious objection cases in other contexts, indicates that the Free Exercise Clause does not create a right to conscientious objection to military service, nor would the Free Exercise Clause invalidate the proposed definition.

The Supreme Court repeatedly stated in a string of cases during the first half of this century that it found no right to conscientious objection to compelled military service in the Constitution. The Court’s first reference to the government’s ability to compel military service, even in the face of religious convictions that conflicted with such service, appeared in *Jacobson v. Massachusetts*,²¹⁷—a case that dealt not with military service, but with compulsory smallpox vaccinations. In the Selective Draft *Cases*,²¹⁸ the Court ruled on a free exercise challenge to the draft in World War I as applied to the conscientious objectors. The Court’s treatment of the free exercise argument, however, was terse at best, rejecting the claim “because we think its unsoundness is too apparent to require us to do more.”²¹⁹

Between the two World Wars the Court used two other, non-military cases to restate its belief that the Constitution did not

²¹⁶See *Welsh v. United States*, 398 U.S. at 356-59 (Harlan, J., concurring); Sullivan, *supra* note 85.

²¹⁷197 U.S. 11 (1905). The *Jacobson* Court noted the following:

[A]nd yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.

Id.

²¹⁸245 U.S. 366 (1918).

²¹⁹*Id.* at 390.

protect a right to conscientious objection to compelled military service. In *United States v. MacIntosh*,²²⁰ the Court included dicta in its opinion that clearly stated its belief that the draft exemption for conscientious objectors was a matter of legislative policy and not constitutional obligation. The Court commented, "The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him."²²¹

In the second case, *Hamilton v. Regents*,²²² the Court upheld a requirement that all male students at the University of California, Berkeley, enroll in military science courses. The petitioner challenged the requirement on the basis, among others, that the requirement violated the religious and conscientious beliefs of students opposed to war and military training.²²³ The Court denied the challenge, citing the voluntary nature of university enrollment and the dicta from *MacIntosh* and *Jacobson* on the military obligations that government may compel of citizens, even those conscientiously opposed to military service.²²⁴ Finally, in the 1946 case *In re Summers*,²²⁵ the Court again took the opportunity to comment in dicta that the conscientious objector exemption was a matter of legislative grace and could be repealed.²²⁶

Although many commentators²²⁷ and some courts²²⁸ have criticized these cases, the Supreme Court nevertheless referred to them again more recently in dicta suggesting that the Constitution does not mandate relief for conscientious objectors.²²⁹ The circuit courts that have squarely faced the issue of whether the Constitution mandates a conscientious objector exemption have

²²⁰283 U.S. 605 (1931), *rev'd on other grounds sub. nom.*, *Girouard v. United States*, 328 U.S. 61 (1946).

²²¹*Id.* at 623-24.

²²²293 U.S. 245 (1939).

²²³*Id.* at 253.

²²⁴*Id.* at 255.

²²⁵325 U.S. 561 (1945).

²²⁶*Id.* at 572.

²²⁷*See, e.g.*, Frederick L. Brown et al., *Conscientious Objection: A Constitutional Right*, 21 NEW ENG. L. REV. 545, 557-61 (1985-86); Spencer E. Davis, Jr., Comment, *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exemptions*, 19 FLA. ST. L. REV. 191, 194-99 (1991).

²²⁸*See* *Anderson v. Laird*, 466 F.2d 283, 295 n.80 (1972), *cert. denied*, 409 U.S. 1076 (1972) (criticizing *Hamilton*, while upholding a free exercise challenge to mandatory chapel attendance at the United States Military Academy).

²²⁹*Gillette v. United States*, 401 U.S. 437, 461 n.23 (1971).

found no such obligation.²³⁰ The Court's most recent free exercise jurisprudence supports this conclusion.

Even prior to these most recent conscientious objection cases, however, the Supreme Court's opinion in *Gillette v. United States*²³¹ demonstrated that the Court would not apply a close scrutiny standard to free exercise challenges to the conscientious objector exemption. The Court's subsequent decisions in conscientious objection cases, both within and outside the military context, verify that the Court will apply a deferential standard to cases of conscientious objection to military service.

In *Gillette*, the Court upheld against Free Exercise and Establishment Clause challenges the statutory and regulatory restriction that a conscientious objector must object to all wars. Although the Court explicitly ruled on the free exercise challenge, it did not apply the "compelling government interest-least restrictive alternative" standard from *Sherbert v. Verner*²³² to determine whether the government restriction violated the Constitution.²³³ Rather, the Court held, "The incidental burdens felt by persons in petitioner's position are strictly justified by substantial government interests that relate directly to the very impacts questioned."²³⁴ The Court, therefore, changed the standard of review for this free exercise challenge from "compelling government interest-no less restrictive alternative" to "substantial government interests-related directly to the impacts on free exercise interests."

The Court found two substantial government interests that justified the infringement on free exercise interests. The first of these was "the interest in maintaining a fair system for determining 'who serves when not all serve'."²³⁵ Justice Marshall,

²³⁰ *Nurnberg v. Froelke*, 489 F.2d 843 (2d Cir. 1973); *Brown v. McNamara*, 263 F. Supp. 686 (D.N.J. 1967), *aff'd*, 387 F.2d 150 (3d Cir.), *cert. denied* 390 U.S. 1005 (1968); *United States v. Mullins*, 430 F.2d 1332 (4th Cir. 1970); *Hopkins v. Schlesinger*, 515 F.2d 1224 (5th Cir. 1975); *Rose v. United States*, 129 F.2d 204 (6th Cir. 1942); *United States v. Wilson*, 440 F.2d 382 (8th Cir. 1971); *O'Connor v. United States*, 415 F.2d 1110 (9th Cir. 1969); *United States v. Koehn*, 457 F.2d 1332 (10th Cir. 1972).

²³¹ 401 U.S. 437 (1971).

²³² 374 U.S. 398 (1963) (imposing a heavy burden of proof on the government of demonstrating compelling government interest and no less restrictive alternatives in order to justify a substantial infringement of free exercise interests-the so-called "strict scrutiny" analysis).

²³³ *Sherbert v. Verner* caused a flurry of predictions that the conscientious objector exemption had become a matter of constitutional right. *See, e.g.*, Abner Brodie & Harold P. Sutherland, *Conscience, the Constitution and the Supreme Court: The Riddle of United States v. Seeger*, 1966 WIS. L. REV. 306, 319-27 (1966); Brahm, *supra* note 85, at 14-15; Mansfield, *supra* note 195, at 59-81.

²³⁴ 401 U.S. at 462.

²³⁵ *Id.* at 455 (quoting MARSHALL REPORT, *supra* note 129 (subtitled, in part, "In Pursuit of Equity: Who Serves When Not All Serve?")).

writing for the Court, was concerned with the difficulty of fairly and uniformly distinguishing claims of objectors to particular wars based on religious beliefs from those based on political or other unprotected beliefs. Marshall pointed out, "There is a danger that as between two would-be objectors, both having the same complaint against a war, that objector would succeed who is more articulate, better educated, or better counseled."²³⁶

The Court further described its concern over an unfair system as follows:

[R]eal dangers [would arise] . . . if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations. Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government.²³⁷

Accordingly, the Court found that fairness in the administration of the conscientious objector program is a "substantial government interest" sufficient to justify infringement of free exercise interests.

The second government interest the Court cited was "the government's interest in procuring the manpower necessary for military purposes pursuant to the constitutional grant of power to Congress to raise and support armies."²³⁸ This interest apparently is the larger interest that subsumes the "fairness" of the conscientious objector program.

Although the Court did not discuss them in its analysis, the free exercise impacts that arose in *Gillette* were that military service in Vietnam violated the petitioners' religious beliefs that forbade their participating in "unjust" wars.²³⁹ The Court, however, did not examine either the depth of the free exercise infringement posed by compelled military service against petitioners, religious beliefs or the effectiveness of compelling military service of persons who were forbidden by their religion from participating in the Vietnam war.

The Court's opinion in *Gillette* stood for three propositions concerning the analysis of free exercise claims against conscientious objection programs. First, after *Gillette*, Courts could not

²³⁶*Id.* at 457.

²³⁷*Id.* at 460.

²³⁸*Id.* at 462.

²³⁹*Id.* at 439-40.

adjudicate these claims according to the compelling government interest standard. Instead, they would have to adopt the more lenient standard requiring substantial government interests related directly to the burdens those interests impose on protected interests. Second, courts could not inquire into the actual necessity for imposing the burden, but had to accept as sufficient the potential for disruption of the government's substantial interests. Finally, courts would permit fundamental infringements upon deeply held free exercise interests if the government could meet its relatively light burden of proof.²⁴⁰

As a way of illustrating this last point, Gillette stands for the proposition that the government actually may compel wartime military service from an individual whose deeply held religious beliefs forbid such service because of the unjust nature of the war. The Court's analytically gentle treatment of the government's position in Gillette was a harbinger of what was to come in the judicial review of military decision making.

A series of subsequent conscientious objector cases in other contexts confirmed that the Court had abandoned the compelling government interest test for these cases—certainly in the military context. In *Johnson v. Robison*,²⁴¹ the Court again used the substantial interests standard to uphold a statute that denied veteran's benefits to conscientious objectors who performed alternative forms of service. The Court cited "the government's substantial interest in raising and supporting armies" as justifying the burden on the objectors' free exercise interests.²⁴² In *Goldman v. Weinberger*,²⁴³ the Court denied a free exercise claim against an Air Force uniform regulation that prohibited a Jewish officer from wearing a yarmulke. The Court's very brief opinion merely cited the government's interest in uniformity as a matter of military necessity, which justified the regulatory restriction. The opinion did not analyze the nature or scope of the free exercise imposition that resulted, nor did it inquire into the reasonableness of the regulation in serving the asserted government interest.

The final case in this series, *Employment Division, Department of Human Resources of Oregon v. Smith*,²⁴⁴ demonstrates how the Court has backed away from free exercise challenges to

²⁴⁰ See also *United States v. Ehlert*, 402 U.S. 99 (1970) (upholding the restriction in the conscientious objector program that such objections must be claimed prior to induction or they will be waived).

²⁴¹ 415 U.S. 361 (1974).

²⁴² *Id.* at 384.

²⁴³ 475 U.S. 503 (1986).

²⁴⁴ 494 U.S. 872 (1990).

governmental activity. Justice Scalia, writing for the Court, limited the scope of the compelling government interest test to two circumstances only. One circumstance requiring the compelling government interest test arises when conscientious objectors to government requirements invoke other constitutionally protected rights in addition to free exercise interests.²⁴⁵ The other circumstance occurs when the government denies unemployment benefits under circumstances that penalize the exercise of religious beliefs.²⁴⁶

Scalia summarized the holding in *Employment Division v. Smith* by saying the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."²⁴⁷ He further stated that, although the government may accommodate religious practices that conflict with generally applicable and otherwise valid laws, the Constitution does not mandate any such exemptions.²⁴⁸

The minimalist position adopted by the Court in *Employment Division v. Smith* reflects the Court's growing unease over recognizing a constitutional right to object, on grounds of religious conscience, to government actions or governmentally imposed obligations. This unease has been present throughout the Court's conscientious objection jurisprudence.²⁴⁹ Commentators likewise have noted the contradictions inherent in recognizing free exercise exemptions, but limiting the circumstances in which such exemptions are required because of the potential for an unacceptable collective impact on government operations.²⁵⁰ The Court resolved this ambivalence in *Employment Division v. Smith* by handing the issue back to the legislative branch. It effectively held that government is free to accommodate religion, but is not constitutionally obliged to do so, as long as government does not target religious groups or practices.

²⁴⁵ *Id.* at 889.

²⁴⁶ *Id.* at 891.

²⁴⁷ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring)).

²⁴⁸ *Id.* at 890.

²⁴⁹ *See, e.g.*, *Sherbert v. Verner*, 374 U.S. at 420-21 n.2 (Harlan, J., dissenting) (granting exemptions to religion-neutral laws risks rising claims of free exercise exemptions from all manner of government obligations); *United States v. Lee*, 455 U.S. 252 (1982) (upholding a Social Security tax against free exercise challenge by Amish on the grounds that no principled method existed to distinguish the Amish conscientious objections from others' nonreligious objections, and citing the example of war tax resisters as evidence of the unworkable nature of such exemptions).

²⁵⁰ Folk, *supra* note 168, at 70-72; *see* Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 *OHIO ST. L. J.* 401, 429-31 (1986).

In addition to the Supreme Court precedents that address the issue of conscientious objection, another line of cases affect any judicial review of military actions infringing on soldiers' constitutionally protected interests. *Goldman u. Weinberger* is just one of a series of military cases over the past twenty years in which the Supreme Court repeatedly has reaffirmed its commitment to practice judicial deference when reviewing military actions or actions pursuant to Congress's war powers.

Even during the 1960s, a period of significant judicial intrusion into military and congressional war powers decision making,²⁵¹ the Court professed deference to military expertise in such matters.²⁵² This professed deference assumed real meaning in later cases such as *Parker u. Levy*,²⁵³ *Brown v. Glines*,²⁵⁴ *Rostker u. Goldberg*,²⁵⁵ *Goldman u. Weinberger*,²⁵⁶ and *Solorio u. United States*,²⁵⁷ in which the Court adopted a deferential approach to constitutional challenges to military or congressional

²⁵¹ See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965) (interpreting the Selective Service law's conscientious objector exemption very broadly); *Welsh v. United States*, 398 U.S. 333 (1970) (expanding the Selective Service conscientious objector exemption even further after Congress amended the law to legislatively overrule *Seeger*); *Gutknecht v. United States*, 396 U.S. 460 (1970) (overturning the Selective Service System practice of inducting delinquent registrants into the military); *O'Callahan v. Parker*, 395 U.S. 258 (1969), overruled by *Solorio v. United States*, 483 U.S. 435 (1987) (holding the military does not possess criminal jurisdiction to prosecute a soldier under military law unless it can demonstrate that the offense was "service-connected with *Solorio* expressly overruling the "service-connection" requirement).

²⁵² See Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186-87 (1962) ("So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited [T]he tradition of our country, from the time of the revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have").

²⁵³ 417 U.S. 733, 758 (1974) ("While members of the military are not excluded from the protection granted by the first amendment, the different character of the military community and of the military mission require a different application of these protections").

²⁵⁴ 444 U.S. 348 (1980) (applying a substantial government interests test to uphold a prior restraint on speech, justifying this approach by pointing to the military's specialized and separate society, which requires loyalty, discipline and high morale to accomplish the military mission).

²⁵⁵ 453 U.S. 57 (1981) (upholding gender-based discrimination in military draft registration based upon the administrative necessity of creating a readily identifiable pool of manpower upon which to draw in a military mobilization).

²⁵⁶ 475 U.S. 503 (1986) (upholding Air Force uniform restrictions based on military necessity against constitutional attack for the restrictions' infringement upon free exercise interests).

²⁵⁷ 483 U.S. 435 (1987) (upholding exercise of military criminal law jurisdiction over offenses not related to military service against a challenge that such jurisdiction deprived service personnel of constitutional protections).

war powers decision making. This deferential review may take the form of modified constitutional standards or of granting great weight to asserted military interests without real review of the factual basis for those interests or both.²⁵⁸

The opinion in *Rostker v. Goldberg* states the Court's general deferential approach in the context of actions pursuant to congressional war powers as follows: "[J]udicial deference to . . . congressional exercise[s] of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for its governance is challenged."²⁵⁹ *Rostker v. Goldberg* upheld Congress's decision to limit draft registration to men against a challenge that this violated Fifth Amendment equal protection interests. The Court found the government interest in administrative efficiency in generating a pool of manpower for military purposes sufficient to justify gender-based discrimination.

The Court in *Goldman v. Weinberger* outlined its similarly deferential approach in the more specific circumstance of First Amendment challenges to military action as follows: "[R]eview of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."²⁶⁰ The Court justified these deferential approaches by noting the unique needs and character of the military society and of the military mission.²⁶¹ The Court also pointed to the express constitutional grants of authority to the legislative and executive branch to organize and control the armed forces.²⁶² Finally, the Court pointed to a judicial lack of expertise in this area as another reason for deference to military decision making.²⁶³

These Supreme Court precedents in the area of free exercise and in the more general area of constitutional review of military decision making guide the analysis of whether the proposed definition of "religious training and belief" can withstand challenge under the Free Exercise Clause. Initially, *Employment Division v. Smith* indicates that the entire in-service conscientious objector program is discretionary. The legal obligations of soldiers voluntarily serving on active duty arise from religion-

²⁵⁸ Folk, *supra* note 168, at 76-78.

²⁵⁹ *Rostker*, 453 U.S. at 70.

²⁶⁰ *Goldman*, 475 U.S. at 507.

²⁶¹ *Parker v. Levy*, 417 U.S. 733, 758 (1974).

²⁶² *Rostker v. Goldberg*, 453 U.S. at 57.

²⁶³ *Solorio v. United States*, 483 U.S. 435 (1987).

neutral and otherwise valid laws of general applicability.²⁶⁴ The Constitution does not require the government to accommodate the free exercise interests of persons whose religious beliefs may conflict with the obligations imposed by such laws.²⁶⁵ This conclusion is consistent with every pronouncement the Supreme Court has ever made on the subject of whether the government is obliged to exempt conscientious objectors from military service.

After identifying the discretionary nature of a conscientious objector program, the principles from *Gillette, Goldman v. Weinberger*, and the cases applying the principle of deference to military decision making guide a review of the constitutionality of the scope of the program. The proposed definition²⁶⁶ excludes secular objectors and those who claim a personal faith lacking the indicia by which society identifies a religion. Applying the principles of the cases outlined above, the proposed definition does not unconstitutionally infringe these persons' free exercise interests.

If the claimants' conscientious objections are based on philosophy or other purely secular beliefs, they fall outside the proposed definition and likewise outside the scope of free exercise protection as defined in *Wisconsin v. Yoder*.²⁶⁷ Even assuming the claimants were able to demonstrate a religious basis for their conscientious objections, but one that fell outside the definition, the deferential standard of review under *Goldman* would require only that the government demonstrate a military necessity justifying the infringement on free exercise interests. In this case, the proposed definition is justified by the need for fairness and administrative efficiency in administering the in-service conscientious objector program.²⁶⁸ These are precisely the same government interests that the Court found "substantial" in *Gillette* and that the Court found to justify gender-based discrimination in *Rostker v. Goldberg*. Given the genuine government interests involved and the reasonable basis for the definition, the proposed

²⁶⁴These laws include the statutory provisions governing military enlistments and appointments of officers. *See* 10 U.S.C. § 505 (1988) (military enlistments and reenlistments); *id.* § 651 (1988) (required service obligations of all personnel becoming members of the armed forces-including officers).

²⁶⁵*Employment* Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990).

²⁶⁶*Beliefs* arising from a recognition of a supernatural component to life. This supernatural component may be represented by belief in God; belief in an afterlife; or belief in the ability to reach a higher existence beyond the world as humanity understands it. These beliefs must provide an explanation for existence; must impose moral obligations; must encourage specific behaviors and practices; and must be shared by a community of adherents. *See supra* Part V.A.3.

²⁶⁷*See supra* notes 174-180 and accompanying text.

²⁶⁸*See supra* Part V.A.2.

definition satisfies the Supreme Court's standard of review for free exercise challenges to military decision making.

(b) Establishment Challenge.—The First Amendment's prohibition against establishment of religion raises a potential challenge to the proposed definition under the theory that the definition impermissibly favors religion over nonreligion and certain disfavored religions. Although the Supreme Court's jurisprudence in the area of the Establishment Clause is far from clear,²⁶⁹ the approach adopted by the Court in *Gillette* and the deferential standard of review in First Amendment cases in the military indicate that the proposed definition would meet constitutional requirements.

The gist of the Establishment Clause challenge is that, by using religious criteria to define the class of persons eligible to benefit from the conscientious objector program, the government is selectively favoring, and thereby endorsing, religion as defined by the government. Taken to its logical conclusion, this argument would preclude the government from ever accommodating the religious beliefs or obligations of any person. Obviously, this cannot be the government's obligation under the Constitution; otherwise the government continually would be inhibiting citizens' free exercise rights.

In *Everson v. Board of Education*,²⁷⁰ the Court first articulated its belief that the Establishment Clause requires government neutrality toward religion. The Court has spent the last forty-five years trying to cobble together a constitutional test or standard that could enforce this neutrality universally.²⁷¹

The Court in *Gillette*, however, did determine how to enforce the Establishment Clause admonishment to neutrality in the context of conscientious objection to military service. Justice

²⁶⁹ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1983) (split court); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (opinion of the Court upholding one challenged governmental action, but a separate majority finding against a second challenged governmental activity; five different opinions in the case); *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (opinion of the Court did not rely on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in its analysis even though *Lemon* previously had been the most commonly applied analytical approach to Establishment Clause cases; three opinions in the case).

²⁷⁰ 330 U.S. 1 (1947).

²⁷¹ See *Abington School Dist. v. Schempp*, 347 U.S. 203, (1963) (applying a secular purpose and principle effects test to measure neutrality); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (applying a secular purpose, principle effects and unnecessary entanglement test to measure neutrality); *Lynch v. Donnelly*, 465 U.S. 668 (1983) (using principles from *Lemon* along with measuring secular symbols as impacting determination of secular purpose and principle effect); *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (refusing to apply *Lemon*, but finding subtle government coercion in graduation prayer violated Establishment Clause prohibitions).

Marshall began his Establishment Clause analysis by ensuring the conscientious objection exemption did not require affiliation with any particular denomination or theological position.²⁷² The Court did not find the exemption to represent an impermissible government endorsement merely because it required religious objections as a prerequisite to eligibility.

The Court then found that the law did not discriminate between religions or on the basis of religious beliefs except for beliefs regarding war, thereby effecting a possible *de facto* discrimination against religious beliefs espousing just war theory.²⁷³ Once it found possible *de facto* discrimination amounting, to the government selectively favoring one form of religious belief over another, the Court examined whether the government had a neutral, secular basis for the classification. The Court found that the statute's intent was not to favor one religion over another and that its neutral, secular purpose was to promote a "fair, even-handed and uniform" selection process.²⁷⁴

Applying this analytical scheme to the proposed definition, leads to the same result that the Court reached in *Gillette*. Although the in-service conscientious objector program requires religious belief as a prerequisite to eligibility, as in *Gillette*, this alone does not violate the Establishment Clause prohibition. Although the proposed definition is broad enough to encompass just about any belief system that society would recognize as constituting religion, it may amount to a *de facto* discrimination against certain personal beliefs that the adherents claim to constitute religion. As proposed, however, the government's purpose in defining religion is not to discriminate between religions, but to ensure an even-handed and efficient mechanism for evaluating claims for conscientious objector status. This is the same purpose that the Court found to be sufficient to justify the exclusion of religion-based selective conscientious objectors in *Gillette*.

The analysis from *Gillette* indicates that the proposed definition passes constitutional muster. The Court's subsequent holding in *Goldman v. Weinberger*, that the standard of review in First Amendment cases involving the military is much more deferential than the standard in civilian cases,²⁷⁵ only reinforces the outcome in this case. The Court, by that time, consistently

²⁷²401 U.S. 437, 450-51 (1971).

²⁷³*Id.* at 250.

²⁷⁴*Id.* at 455.; see also *supra* notes 207-216 and accompanying text (discussing the substantial government interests that the Court found to justify the *de facto* discrimination and free exercise infringement present in *Gillette*).

²⁷⁵See *supra*, note 260.

had applied this deferential standard in other, military First Amendment cases.²⁷⁶

The Supreme Court's jurisprudence in the area of challenges to military or congressional war powers decision making, under either the Free Exercise Clause or the Establishment Clause, would uphold the proposed definition. The many cases applying a deferential standard of review to such challenges demonstrate that the Court simply does not apply a close scrutiny standard in these circumstances.²⁷⁷ When the military can articulate a neutral and secular purpose for the definition,²⁷⁸ that military decision will withstand constitutional attack.

B. Correcting Administrative Difficulties Under the Current In-Service Conscientious Objector Program

The current in-service conscientious objector program suffers from several administrative problems, many but not all of which will be resolved by adopting the proposed definition of "religious training and belief."²⁷⁹ Besides the practical difficulties caused by a confusing and overbroad standard, the current program suffers from having to rely on investigations conducted under circumstances that create an unacceptable potential for a lack of uniformity, accuracy, and fairness.

The in-service conscientious objector program mandates an investigation by an officer outside the claimant's chain of command.²⁸⁰ These investigations, however—critical as they are to ensuring uniform, accurate, and fair outcomes—are subject to the same weaknesses that led to criticism of the Selective Service conscientious objector exemption process. Commentators criticized the conscientious objector exemption administered by the Selective Service during the Vietnam War era as "unreliable."²⁸¹ These writers pointed to several factors that led to a lack of uniformity, accuracy, and fairness in implementing the exemption. Measuring the current program against the problem areas identified from the Selective Service experience reveals that many of the same problems affect the current in-service program.

The very nature of an inquiry into a claim of conscientious objector status requires a rigorous approach. Investigating an individual's personal religious beliefs and value system is a

²⁷⁶ See *supra* notes 253, 254.

²⁷⁷ See *supra* Part V.A.4.(a)

²⁷⁸ See *supra* Part V.A.2. (discussing the adverse consequences of the current, overbroad standard).

²⁷⁹ See *supra* note 266.

²⁸⁰ See *supra* notes 58-62 and accompanying text.

²⁸¹ Field, *supra* note 163, at 889.

complicated, personal, and abstract matter.²⁸² Such an inquiry requires sensitivity, as well as familiarity with the applicable standards and a willingness to pursue inconsistencies or ambiguities in the claimant's information.

One criticism of the Selective Service program was that the local draft boards examining conscientious objector claims had no special experience or expertise in investigating such matters.²⁸³ Furthermore, because of the small number of conscientious objector claims, the local boards never were able to develop sufficient familiarity or expertise to ensure uniform and accurate results.²⁸⁴

The in-service conscientious objector program is subject to these same shortcomings. The Department of Defense directive does not require any special expertise or qualifications of the officer appointed to investigate a conscientious objection claim.²⁸⁵ As a result, investigating officers receive their appointments on an ad hoc basis, which becomes apparent in the uneven quality of the reports of investigation. Some investigations are very comprehensive, while others do little more than recite standards from the regulation.²⁸⁶

Because conscientious objector claims are not common,²⁸⁷ investigating officers cannot draw on a well of experience in investigating such cases. This is a particularly disabling circumstance in the often complicated and always very personal matter of investigating the sincerity of deeply held beliefs.

Being able to draw upon some measure of expertise is particularly important in investigating conscientious objector cases because these cases involve two persons—the investigating officer on the one hand and the claimant on the other—with fundamentally conflicting views on the morality of their continued participation in the military. This circumstance parallels the situation during the draft era when a large percentage of the volunteer members of local draft boards were members of veterans organizations.²⁸⁸ That the two concerned parties apparently come to the investigation with incompatible beliefs gives rise to the inference that the investigating officer may harbor hostility to the claimant's position—a position that rejects some of

²⁸² See *supra* note 177.

²⁸³ Rabin, *supra* note 174, at 1017-18; Field, *supra* note 163, at 894.

²⁸⁴ Rabin, *supra* note 174, at 1018.

²⁸⁵ 32 C.F.R. § 75.6(d) (1992) ("Commanders . . . will appoint an officer in the grade of O-3 or higher to investigate the applicant's claim").

²⁸⁶ Darpino interview, *supra* note 78.

²⁸⁷ See *supra* note 3.

²⁸⁸ Rabin, *supra* note 174, at 1019.

the fundamental values to which the investigating officer has devoted his or her life.²⁸⁹

Consequently, the investigating officer must be careful to avoid judging the claimant's values and beliefs according to the investigating officer's own values and beliefs. This becomes very difficult, however, when, as happened during Operations Desert Shield and Desert Storm, an investigating officer is preparing for the same deployment that the claimant would avoid if granted conscientious objector status.²⁹⁰ Even if the investigating officer can put aside his or her own beliefs, conducting the kind of searching and independent investigation that the process requires to ensure accuracy, uniformity, and fairness is difficult during preparation for deployment.²⁹¹

Another shortcoming commentators identified in the Selective Service conscientious objector program was the inadequacy of the information available from the investigation because of the source of most of the information. Dean Zillman, in his article reviewing the in-service process as it existed in 1972, described the records of investigation before the Conscientious Objector Review Board as "woefully inadequate" to support a reasoned conclusion on the complex issue of the claimant's sincerity.²⁹² He pointed out that much of the paper record was generated by the applicant himself who, with competent counsel, easily could create a prima facie case.²⁹³ Professor Field was likewise critical of the Selective Service procedure, which also tended to rely heavily—if not almost exclusively—on information provided by the claimant.²⁹⁴ This created a situation ripe for fraud.

Unfortunately, the current in-service conscientious objector program faces the same problems. Although the Department of Defense directive states that the purpose of the investigation is to create a complete record to facilitate an informed decision,²⁹⁵ the directive gives little guidance on what might constitute a complete record. Because the directive permits the investigating officer to define the scope of the investigation, the directive creates the strong possibility that the investigation will focus simply on whatever information the claimant offers. As one investigating officer candidly observed, "[The investigation] was

²⁸⁹*Id.*

²⁹⁰Darpino interview, *supra* note 78.

²⁹¹Freeman interview, *supra* note 86.

²⁹²Zillman, *supra* note 85, at 126.

²⁹³*Id.*

²⁹⁴Field, *supra* note 163, at 898.

²⁹⁵32 C.F.R. § 75.6(d)(2) (1992).

more the case he brought me.”²⁹⁶ This is not surprising given the extremely personal nature of much of the relevant information; the conflicting priorities of the investigating officer, particularly in a deployment situation; and the relative lack of experience the investigating officer brings to this new and complex problem.

The Department of Defense could improve the quality of the investigation by centralizing the process. The military should designate the investigating officer in advance of any conscientious objector claims and assign that officer either a unit or area jurisdiction, such as a Corps in the active Army or a Corps-equivalent in the Reserves and other services. This would enable the investigating officer to benefit from experience as he or she investigates cases and develops practical expertise that he or she can pass along to the replacement officer.

The designated investigating officer should be a judge advocate. Appointing a judge advocate would take advantage of professional education and experience in statutory and regulatory interpretation, evidence analysis, and other skills uniquely useful in investigating conscientious objector cases.

Because of this professional education and experience, a judge advocate, more than a line officer, will be familiar with interpreting and applying complex regulatory guidance. A judge advocate, more than a line officer, will be familiar with conducting analyses of factual situations according to legal standards. A judge advocate will be familiar with techniques for probing and evaluating the veracity, logical consistency, and probative value of live testimony, written statements, and other forms of evidence. Requiring a judge advocate for the investigating officer would ensure a certain level of expertise in the inquiry process and thereby should contribute to greater uniformity, accuracy, and fairness in the outcome.

The Department of Defense also should require certain procedures concerning the scope of the investigation that would tend to improve the process. The directive should require the investigating officer to interview specific witnesses. The investigating officer should take testimony from the claimant's commander, the claimant's first-line supervisor, at least two co-workers, and at least one roommate or other person likely to have detailed knowledge of the claimant's beliefs. In addition, the directive should direct the investigating officer to contact the claimant's parent or parents for their statement. These directed interviews would provide the investigating officer with a baseline of information without relying on sources provided by the claimant.

²⁹⁶ Freeman interview, *supra* note 86.

Creating a designated investigating officer from the corps-level staff judge advocate office and directing specific investigative steps will go far toward correcting administrative shortcomings in the conscientious objector factfinding process that have plagued the program for decades. A review of the military's experiences with the in-service conscientious objector program to learn from its past problems is long overdue.

C. Addressing the Fairness Issue of the "Benefiting Conscientious Objector" — Alternative Service

The remaining issue deserving careful consideration is the fairness problem posed by the conscientious objector who seeks a discharge after receiving the benefit of graduate-level or other significant education or professional training at the military's expense. A soldier receiving such training incurs a military service obligation of a period of years.²⁹⁷ The current in-service conscientious objector policy grants this soldier a full discharge and release from the obligation if the investigation results in a finding of conscientious objector status.²⁹⁸ The Selective Service conscientious objector provision, on the other hand, contains a provision that requires alternative service for registrants granted a conscientious objector exemption.²⁹⁹

²⁹⁷ See 10 U.S.C. § 2004 (1988) (outlining the service obligation arising from the Funded Legal Education Program); *id.* § 2005 (outlining the service obligation arising from the advanced educational assistance program); *id.* § 2114 (outlining the service obligation arising from attendance at the Uniformed Services University of Health Sciences); *id.* § 2123 (outlining the service obligation arising from participation in the Health Professions Scholarship program); *id.* § 2128 (outlining the service obligations arising from participation in the Reserve Component Health Care Professional Financial Assistance program).

²⁹⁸ *But see id.* § 2123(e) (explaining that persons released by a Service Secretary from a military obligation under the Health Professions Scholarship Program may be required to work in a health service capacity in an area designated by the Department of Health and Human Services as suffering from a manpower shortage). This provision, in effect, subjects a medical professional discharged under the in-service conscientious objector program to an alternative service obligation, but this applies only to the Health Professions Scholarship Program.

²⁹⁹ The exemption contains the following alternative service provision:

Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed services under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) ... such civilian work contributing to the maintenance of the national health, safety or interest as the Director may deem appropriate

50 U.S.C. app. § 456(j) (1988).

The underlying justifications for requiring alternative service of Selective Service registrants granted a conscientious objector exemption from military service during a draft apply equally to the benefiting in-service conscientious objector. As the nation struggled with the question of who ought to be exempted from military service, Congress and others involved in resolving that question repeatedly returned to the guiding theme that the system for selecting citizens for military service or for exemptions from military service must be fair.³⁰⁰ If the system were not fair, national unity would be imperiled and those not favored by the exemption process would serve with the bitter knowledge that others equally capable of serving had found undeserved shelter in an exemption.³⁰¹

Congress responded to this national demand for equity in the context of the conscientious objector by requiring some form of alternative civilian service in lieu of military service.³⁰² The principle function of this alternative service was to demonstrate that the burden of national service would be shared equally, even by those whose religious beliefs forbid them from participating in military service.³⁰³ Commentators have pointed out that the cost of administering these alternative service programs probably have outweighed any benefit the nation received in terms of actual civilian work performed.³⁰⁴ Nevertheless, the less tangible benefit of demonstrating a national resolve to administer fairly the

³⁰⁰ See Monograph, *supra* note 7, at 1; LYNDON B. JOHNSON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR EXTENDING THE DRAFT AUTHORITY, LOWERING AGE FOR DRAFTING, CORRECTING THE DEFERMENT INEQUITIES, DEVELOPING A FAIR AND IMPARTIAL SYSTEM OF SELECTION, AND ESTABLISHING A TASK FORCE FOR REVIEWING RECOMMENDATIONS FOR A RESTRUCTURED SELECTIVE SERVICE SYSTEM, H.R. Doc. No. 75, 90th Cong., 1st Sess. 2 (1967) ("Fairness has always been one of the goals of the Selective Service System"); H.R. REP. No. 267, 90th Cong., 1st Sess. 26 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1308, 1334 (discussing the alternative service requirement and describing it as equitable).

³⁰¹ See H.R. Doc. No. 75, 90th Cong., 1st Sess. 2-3 (1967).

³⁰² The alternative service provisions in the successive draft laws are found at 50 U.S.C. app. § 456(j) (1988); Universal Military Training and Service Act of 1951, Pub. L. No. 81-51, § 1(q), 65 Stat. 86 (1951); Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 889 (1940); Act of May 18, 1917, Pub. L. No. 65-12, § 4, 40 Stat. 78 (1917). Although the legislative history of the 1948 Act discusses the provision it made for alternative service, the Act itself does not contain an alternative service requirement for registrants exempted from service as conscientious objectors. S.R. REP. No. 1268, 80th Cong., 2d Sess. 13 (1948), *reprinted in* 1948 U.S.C.C. 1989, 2002; Selective Service Act of 1948, Pub. L. 80-759, § 6(j) 62 Stat. 604, 612 (1948).

³⁰³ Monograph, *supra* note 7, at 1.

³⁰⁴ Field, *supra* note 163, at 937 n.280.

process of who serves when not all serve remains a significant, albeit difficult to measure, justification for such programs.³⁰⁵

The conscientious objector who has benefited from military-funded graduate or professional education or training should provide alternative service in the name of the same equity and fairness goals Congress historically has pursued in the Selective Service program. The public benefit conveyed the benefiting conscientious objector in the form of advanced education and training comes at significant cost in terms of money, time, and force-structure planning. The military must double these investments in every case when a benefiting conscientious objector leaves the service. In addition, the military loses the very tangible services that it planned to receive from the benefiting conscientious objector until his or her replacement can be identified, trained, and integrated into the force structure.

Requiring the benefiting conscientious objector to perform alternative service for a period of time equal to his or her now-discharged military obligation would serve to recoup some of the public benefits the nation currently loses each time a benefiting conscientious objector receives a discharge from the military. In addition to this practical public benefit, the nation also would benefit from the public reaffirmation of the concept of fairness and equity in military service. In this case, a soldier selected to receive a significant educational or training benefit must put that investment to use on behalf of the nation that conferred the benefit.

The conscientious objector benefits from recognition of the religious disability that prevents him or her from further military service. The nation benefits from a return on its educational or professional training investment. The military benefits by a clear rejoinder to the cynics who point to yet another medical doctor (or lawyer or Ph.D), taking his or her military-financed skills with him or her to a potentially lucrative civilian practice while leaving a service obligation behind. The military also benefits from the deterrent effect of a program that imposes a service cost on what, until now, might have been perceived as an attractive ticket home. Consequently, an alternative service requirement in the case of a conscientious objector who has benefited from military funded graduate or professional education or from professional training would serve important public interests.

³⁰⁵ See Monograph *supra* note 7, at 4; Field, *supra* note 163, at 938-40 (proposing a new alternative service arrangement, intended to more closely approximate the degree of imposition actual military service has on registrants, thereby reducing the incentive to make false conscientious objector claims).

VI. Conclusion

The in-service conscientious objector program continues to serve important interests as an expression of national policy, but it suffers from age. The current policy was shaped, in part, by external forces and national interests that no longer exist. Like a used '71 model in a '93 automobile showroom, this product of another time, shaped by the demands of that time, does not meet the needs of the "buyers" it seeks to serve. In this case, the "buyers" are the nation and the nation's military. These "buyers" are not well served by a program designed to meet the needs of an army drawn in large part from conscripted manpower. These "buyers" are not well served by a program shaped in response to the judicial activism of twenty-five years ago. The current volunteer force has very different needs and must meet an ever-changing and complex mission. The in-service conscientious objector program must be restructured to meet the needs of the nation and its military as they exist today.

A. Necessity for an In-Service Conscientious Objector Program

An in-service conscientious objector program serves three enduring purposes, even in an all-volunteer military. Recognizing and excusing religious conscientious objectors from military service continues a long national tradition rising from a national commitment to religious freedom, individual liberty, and democratic pluralism. Providing an in-service conscientious objector program also recognizes the reality that coercing military service from a person whose deeply held religious beliefs forbid such service will seldom make a good soldier. Finally, an in-service conscientious objector program acknowledges the reality that people grow and change throughout their lives. These changes can include changes in a soldier's fundamental belief systems that can, in turn, lead to conflict with that soldier's continued military service. For these reasons, the Department of Defense ought to continue a program to accommodate the needs of the in-service conscientious objector.

B. Necessity for Change in the Current Program

The current in-service conscientious objector program serves a need, but also carries within it several fundamental flaws. The program is burdened with standards and procedures that proved difficult to implement during the draft era and that have not improved with age.

The current program was designed at a time when the military relied upon the draft as a significant source of its

manpower; when the Cold War mission dictated military policy; and when the military was growing to meet the demands of that mission. The current program incorporated judicial standards from litigation involving the Selective Service conscientious objector exemption. These standards were not mandated by the Constitution; were inconsistent with congressional intent in the Selective Service Act; and failed to consider the differences between an in-service conscientious objector program and a conscientious objector program for inductees.

These overinclusive judicial standards proved difficult to apply during the Vietnam War era and continue to cause the same kinds of problems today. The process the military uses to investigate conscientious objector claims proved unwieldy and yielded inconsistent results during the Vietnam War era and continues to cause the same kinds of problems today.

While the flaws in the in-service conscientious objector program remain, the military it serves has undergone fundamental change and continues to change in response to a very different set of national security missions from those of the 1960s. The role of a conscientious objector program in an all-volunteer force is different in subtle ways from the role of a similar program in a force manned to a significant degree by conscripts.³⁰⁶ The potential impacts of an overbroad conscientious objector program in a smaller force, increasingly dedicated to crisis response missions are greater than in a larger, garrison-oriented military.³⁰⁷

The publicity surrounding the issue of conscientious objection arising during Operations Desert Shield and Desert Storm should serve to remind the nation that this issue will return to the surface whenever the nation mobilizes for war. Now is the time to review the program and make the necessary adjustments while the services have the time to examine the impacts and the alternatives, rather than waiting until the next wartime mobilization again points out problems in the program.

C. Inadequacy of the Current Debate Concerning In-Service Conscientious Objection

The most recent debate surrounding the issue of in-service conscientious objection, as that debate is defined by press coverage,³⁰⁸ criticism of the in-service conscientious objector

³⁰⁶ See *supra* Part V.A.2.(b)

³⁰⁷ See *supra* Part V.A.2.(c)

³⁰⁸ See *supra* note 4; Alan C. Miller & Ronald J. Ostrow, *Some Fear Civil Liberties May Be Added to Conflict's Toll*, L.A. TIMES, Feb. 14, 1991, at 9A; Rorie Sherman, *Challenge Brought Over Army Regulation*, NAT'L L.J., Aug. 5, 1991, at 22.

program from the War Resister's League,³⁰⁹ and the legislation proposed in the 102d Congress,³¹⁰ fails to consider the issue as a whole. Rather than exploring the purpose of an in-service conscientious objector policy in a volunteer military and how to best serve that purpose without impairing readiness, the debate focuses on perceived unfairness to the claimant and proposes a range of greater protections and rights for the claimant.

The legislation proposed in the 102d Congress would have codified a right of moral, ethical, or religious conscientious objection to specific military duties, as well as a right of conscientious objection to participation in conflicts specified by the soldier or to participation in all conflicts.³¹¹ The bill would have prohibited the government from denying an applicant conscientious objector status unless the government could prove by clear and convincing evidence that an applicant did not possess the claimed, sincerely-held conscientious objections.³¹² The proposed legislation also included detailed investigative and review procedures, as well as the requirement that the military return to the United States any claimants who file their applications while deployed overseas.³¹³

The current debate seeks these protections and rights for conscientious objector claimants without regard to the strength of the claim; the effect on military readiness; or even the role of an in-service conscientious objector program in a volunteer military. The potential adverse effects of these proposals on military readiness are many and serious.

The Supreme Court itself recognized the well-nigh impossible administrative burdens a policy of selective conscientious objection, as proposed by the legislation, would place on the military.³¹⁴ The very broad scope of the proposed legislation's definition of conscientious objection raises the same fairness and readiness problems discussed earlier.³¹⁵ Contrary to the position

³⁰⁹Update on Military Resisters (War Resister's League, New York, N.Y.), Dec. 1991 (on file with the author).

³¹⁰H.R. 5060, 102d Cong., 2d Sess. (1992) ("Military Conscientious Objector Act of 1992").

³¹¹*Id.* § 2(a)(1)(c-d).

³¹²*Id.* § 2(a)(1)(e).

³¹³*Id.* §§ (1)(g)(2)(B), (1)(j), (1)(k).

³¹⁴*Gillette v. United States*, 401 U.S. 437, 454-60 (1971); *see also* Greenawalt, *supra* note 73, at 50-65 (discussing the distinct problems posed by selective conscientious objection to fair administration of a conscientious objection program); Seng, *supra* note 74, at 149 (discussion of the potentially disruptive effect of permitting selective conscientious objection by an otherwise outspoken advocate of expanded rights for conscientious objectors).

³¹⁵*See supra* Part V.A.2.

adopted in the proposed legislation, even outspoken advocates of greater rights for conscientious objectors would leave the burden of proof with the claimant to avoid the administrative difficulty posed by requiring the government to disprove a claimed sincere belief.³¹⁶ Finally, the legislation's requirement to return claimants to the United States once they file claims while deployed overseas imposes a heavy logistical and readiness burden and amounts to an invitation to fraud by angry, frightened, homesick, or tired soldiers.

The current debate on in-service conscientious objectors is flawed because it fails to identify and address the fundamental questions that surround the issue of in-service conscientious objection.

Any changes to the in-service conscientious objector program should arise from three basic objectives. The first of these is a clear recognition of the purpose of an in-service conscientious objector in a volunteer military. The second objective must be a commitment to fairness and uniformity. This commitment includes not only fairness to the claimant seeking a discharge or reassignment, but also fairness to the nation that soldier swore to serve and to all the other soldiers who will continue to serve should the claimant receive that discharge or reassignment. Finally, the third objective for any changes to the in-service conscientious objector policy must be an accommodation of the fundamental changes in the military that the policy serves. The changes this article recommends flow from and are designed to achieve these three objectives.

D. Benefits of the Proposed Changes

This article proposes three changes to the current in-service conscientious objector program. The first of these changes narrows the scope of the policy—that is the effect of narrowing the definition of “religious training and belief” that qualifies a soldier for conscientious objector status. Narrowing this definition is consistent with Congress's intent in the conscientious objector provision in the Selective Service Act and follows the national tradition of exempting religious objectors from military service. The proposed definition more closely reflects Americans' sense of religion and equity in excusing certain persons from military service. The proposed definition also meets constitutional standards.

This definition avoids the potential for greater readiness problems from a vague and broad exemption. This is particularly

³¹⁶Seng, *supra* note 74, at 147-48.

important should the nation ever again become involved in an unpopular war. The proposed definition also restores greater objectivity to the factfinder's mission in adjudicating a claim of conscientious objection. This greater objectivity will promote accuracy, uniformity, and fairness in the program.

The second recommended change improves the quality of the investigative process used in adjudicating conscientious objector claims. Using designated judge advocates from corps or corps-equivalent staff judge advocate offices to investigate applications for conscientious objector status will ensure a certain level of professional expertise and generate a well of experience in investigating these cases. Requiring directed interviews of commanders, colleagues, and family members will ensure a common baseline of information. Combined, these changes will provide a greater degree of uniformity, accuracy, and fairness than the program currently experiences.

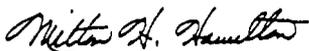
The final recommended change requires alternative service of conscientious objectors who incurred service obligations as a result of funded graduate or professional education or training. This requirement would bring greater fairness to the program by recognizing the needs of the conscientious objector, as well as the obligation owed the nation because of the benefit the objector received. Requiring alternative service in these circumstances also would deter the insincere from seeking conscientious objector status as a ticket back to civilian life with a military-funded education or professional training.

The in-service conscientious objector program continues to serve a purpose in the volunteer military. The changes recommended here will ensure that the program will serve the military and the nation effectively, fairly, and with the least impact on military readiness. Now is the time to trade in the '71 model—limited as it is by the demands and limitations of its day—for a '93 model, free of the defects of the earlier model and designed to meet today's requirements.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

A handwritten signature in cursive script that reads "Milton H. Hamilton".

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
04555